Applicant Details

First Name	**Justin**
Last Name	**Korman**
Citizenship Status	**U. S. Citizen**
Email Address	**jsk10002@nyu.edu**
Address	**Address** Street **110 West 3rd Street, 1503** City **New York** State/Territory **New York** Zip **10012** Country **United States**
Contact Phone Number	**8144045368**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bharara, Preet
pb132@nyu.edu;preetbharara@gmail.com
Rascoff, Samuel
samuel.rascoff@nyu.edu
(212) 992-8907
Been, Vicki
vicki.been@nyu.edu
212-998-6223
Satin, Russell
Russell.Satin@ag.ny.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Justin Korman
110 West 3rd Street, Apt. 1503
New York, NY 10012
814.404.5368
jsk10002@nyu.edu

June 12, 2023

The Honorable Kenneth M. Karas
United States District Court
Southern District of New York
The Hon. Charles L. Brieant Jr. Federal Building and United States Courthouse
300 Quarropas St., Courtroom 521
White Plains, NY 10601-4150

Dear Judge Karas:

I am a rising third-year law student at the New York University School of Law and an Articles Editor of the Annual Survey of American Law. I am writing to apply for a clerkship for the 2025-2026 term or any subsequent term. I am interested in a clerkship in your chambers because of your time as an Assistant United States Attorney, a career I would like to pursue.

Enclosed are my resume, law school transcript, writing sample, and four letters of recommendation. My writing sample, which was prepared for a law school class, analyzes the constitutionality of warrantless long-term pole camera surveillance in the wake of the Supreme Court's decision in *Carpenter v. United States*.

The following individuals have submitted letters of recommendation on my behalf: Professor Vicki L. Been (917.860.1983), New York University School of Law; Professor Preet Bharara (preetbharara@gmail.com), New York University School of Law; Professor Samuel J. Rascoff (917.861.3019), New York University School of Law; and Mr. Russell Satin (203.948.4972), Office of the New York State Attorney General. I took classes with Professors Been, Bharara, and Rascoff, and Mr. Satin supervised my spring internship in the A.G.'s Office.

Please contact me with any questions, and thank you for your consideration.

Respectfully,

/s/ Justin Korman

Justin Korman

JUSTIN S. KORMAN

110 West 3rd Street, Apt. 1503, New York, NY 10012
(814) 404.5368 | jsk10002@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D. Candidate, May 2024
Unofficial GPA: 3.76
Honors: Florence Allen Scholar (Top 10% of class after four semesters)
Activities: *Annual Survey of American Law*, Articles Editor
Prosecution Legal Society, President Emeritus

THE PENNSYLVANIA STATE UNIVERSITY, University Park, PA
B.A., Journalism, *summa cum laude*, with minors in History and Political Science, May 2021
(Completed in six semesters)
Honors: Presidential Leadership Academy
Activities: Penn State Women's Volleyball, Student-Manager
The Lion 90.7fm, Radio Show Host

EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY
Summer Associate, May 2023 - July 2023

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, New York, NY
Law Student Extern, January 2023 - April 2023
Summarized research on open legal questions and made recommendations for Assistant Attorneys General in the N.Y. Attorney General's Public Integrity Bureau. Assisted active investigations by reviewing bank records and electronic communications and assessing their pertinence.

UNITED STATES ATTORNEY'S OFFICE, Brooklyn, NY
Law Student Extern, September 2022 - December 2022
Prepared a prosecution memorandum, pretrial brief, and sample direct examination for Assistant U.S. Attorneys in the Eastern District of New York. Transcribed and summarized witness interviews in the lead up to a multidefendant criminal trial. Attended trial preparation meetings.

UNITED STATES ATTORNEY'S OFFICE, Harrisburg, PA
Law Student Intern, May 2022 - August 2022
Researched discrete legal issues related to venue, hearsay, confessions, witness competency, marital privileges, and the Speedy Trial Act for Assistant U.S. Attorneys in the Middle District of Pennsylvania. Drafted pretrial and post-conviction briefs, including for the Third Circuit.

STATE COLLEGE AREA HIGH SCHOOL, State College, PA
Girls' Basketball Coach, August 2018 - March 2021
Instructed student-athletes on the fundamentals of the sport. Designed daily practice plans and made in-game personnel adjustments. Built lineup evaluation metrics using data analytics.

Name: **Justin S Korman**
Print Date: **06/08/2023**
Student ID: **N18221719**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Torts	LAW-LW 11275	4.0	A-
Instructor: Cynthia L Estlund			
Procedure	LAW-LW 11650	5.0	A
Instructor: Jonah B Gelbach			
Contracts	LAW-LW 11672	4.0	A
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	A
Instructor: Vicki L Been			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Roderick M Hills			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Sheldon Andrew Evans			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Helen Hershkoff			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Eastern District	LAW-LW 10103	3.0	CR
Instructor: Alixandra Smith Erin Reid			
Prosecution Externship - Eastern District Seminar	LAW-LW 10355	2.0	A
Instructor: Alixandra Smith Erin Reid			
Complex Federal Investigations Seminar	LAW-LW 11517	2.0	B-
Instructor: Katherine R Goldstein Parvin Daphne Moyne			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Erin Murphy			
Antitrust: Merger Enforcement and Litigation Seminar	LAW-LW 12723	2.0	B
Instructor: Joseph F. Tringali			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Intelligence: Law, Strategy, Ethics Seminar	LAW-LW 10439	2.0	A
Instructor: Samuel J Rascoff			
Constitutional Law	LAW-LW 11702	4.0	A
Instructor: Maggie Blackhawk			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	A
Instructor: Preet Bharara			
Government Anti-Corruption Externship	LAW-LW 12769	3.0	A
Instructor: Rachel Salem Pauley Jennifer Rodgers			
Government Anti-Corruption Externship Seminar	LAW-LW 12770	2.0	A
Instructor: Rachel Salem Pauley Jennifer Rodgers			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Allen Scholar-top 10% of students in the class after four semesters
Staff Editor - Annual Survey of American Law 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

PREET BHARARA
Distinguished Scholar in Residence
Adjunct Professor of Law

NYU School of Law
40 Washington Square South
New York, NY 10012

12 June, 2023

RE: Justin Korman

Dear Judge:

I write to recommend, enthusiastically, Justin Korman for a federal clerkship. He is smart, thoughtful, dedicated, and a fine writer. Based on his performance in my seminar, The Elements of Criminal Justice, at NYU Law School, I believe Justin would make an excellent law clerk.

In the seminar, which roughly tracks the arc of my book, *Doing Justice*, students examine and critique the process by which justice is done in federal criminal cases by tracing the four main stages of any criminal case—investigation, accusation, judgment, and punishment; as such, the seminar is about legal, ethical, and moral reasoning. Justin was an outstanding student, and he earned one of the very few A's in my class. In fact, all three of his papers earned an A.

Justin is a clear and rigorous writer, who analyzes legal and ethical issues with great focus and intelligence. In each of three assigned papers, he explored a thorny legal or ethical dilemma, deftly crystallizing and addressing issues that have no obvious or clear answers. In his final paper, he did a particularly fine job of assessing the propriety President Obama's commutation of Chelsea Manning's sentence. He was highly thoughtful in considering various factors and values and supported his conclusion with both nuance and rigor.

I am also impressed with Justin's commitment to public service. As you will see from his resume, he has found time to serve in three respected public prosecutor's offices – the New York Attorney General's Office, along with the U.S. Attorney's offices for Eastern District of New York and the Middle District of Pennsylvania.

Justin was among the most prolific participants in class discussion. From those discussions, I know him to be articulate, respectful, personable, spirited, and smart. He has a clear dedication to fairness and justice and the rule of law. I look forward to following his career in service to others. Based on all my dealings with Justin, I believe he would make a terrific judicial law clerk and would be a pleasure to have in chambers.

Respectfully,

/s/

Preet Bharara

New York University
A private university in the public service

School of Law

40 Washington Square South, 411K
New York, NY 10012-1099
Telephone: (212) 992-8907
Facsimile: (212) 995-4590
E-mail: samuel.rascoff@nyu.edu

Samuel J. Rascoff
Professor of Law

June 8, 2023

Dear Judge:

I tried to dissuade Justin Korman from applying for this clerkship :-)

The product of an upbringing in Western Pennsylvania, Justin (while smart as whip) exudes the gentle, polite demeanor of a non-native New Yorker. And so I gently probed to see if he might be open to an opportunity west of the Hudson.

Justin would not hear of it. In coming to NYU Law, Justin made clear to me, he consciously joined the ranks of New Yorkers by choice, the sort immortalized by EB White in his essay "Here is New York." And he has no intention of leaving any time soon.

And so, having failed at dissuading him, I will now try to persuade you to hire Justin. I hope to fare better at this. I have going for me that:

1. Justin is extraordinarily bright and perspicacious.
2. He wrote a first-rate essay in my intelligence law seminar on the Fourth Amendment status of pole cameras.
3. He regularly contributed to that same seminar with outstanding classroom interventions.
4. He has taken a host of interesting classes in, or adjacent to, federal criminal law and has developed the habit of earning many straight As in these (and other) classes.
5. He is wry and funny and a delight to talk to.

Justin is the sort of legal intellect and professional who will do first-rate work for you. And he has the sort of personality that will wear well in chambers.

When it comes to the responsibility that a clerkship entails Justin could, I am sure, make it anywhere. But I am just as confident that he can make it in old New York. Thank you for your consideration and do not hesitate to reach out to me if I can be of further assistance.

Sincerely,

Samuel J. Rascoff

New York University
A private university in the public service

School of Law

40 Washington Square South, 314H
New York, NY 10012-1099
Telephone: (212) 998-6223
Facsimile: (212) 995-4341
E-mail: vicki.been@nyu.edu

Vicki L. Been
Judge Edward Weinfeld Professor of Law
Faculty Director, Furman Center for Real Estate and Urban Policy
Associated Professor of Public Policy at NYU's Robert F. Wagner Graduate School of Public Service

June 12, 2023

RE: Justin Korman, NYU Law '24

Your Honor:

Justin Korman asked me to write to you about his qualifications to serve as your law clerk for the term beginning in the fall of 2024. I am delighted to do so, because I am confident that he will make a terrific clerk. He is bright, personable, hard-working and conscientious, and writes extremely well.

I first met Justin in my first year property course in the spring of 2022. Each time I called on him, Justin was unfailingly well-prepared and ready to jump into a conversation. His comments in class added significant depth to the discussion because he often saw connections between cases, or angles to arguments, that his peers had missed. His analysis was especially discerning, and reflected a keen intellect and deep intellectual curiosity. Justin was well-spoken and direct, and was always polite and respectful of others' arguments, but held his ground firmly and persuasively.

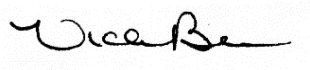
His exam in the course was beautifully written, logically organized, and spot on. Each answer cut quickly to the heart of a problem, and demonstrated substantial intellectual rigor and sharp analytic skills. Justin seems equally at home with legal doctrinal arguments and conceptual policy arguments. He sees the weaknesses of arguments on both sides of a debate, and is tenacious in working through the problems.

I thought so highly of Justin's performance in the property class that I asked him to serve as a research assistant. He was already fully committed to semester internships with the New York Attorney General and the United States Attorney's Office for the Eastern District of New York, so I missed the chance to work with him. I've followed his law school career, though, and have been particularly impressed by the leadership skills he's shown in making the Prosecution Legal Society a forum for students interested in pursuing careers in criminal prosecution (we have lots of programs for students interested in criminal defense, but often neglect those interested in prosecution).

I also found his draft of the paper I hope he'll publish as a journal note particularly strong. Justin's survey and critique of the emerging case law is engaging and a pleasure to read because he writes so clearly and concisely. Justin has a quiet modesty, an up-beat, even-keeled manner and a ready sense of humor. He shows excellent judgment, and is mature, level-headed, and dependable.

In short, Justin has the intelligence and superb communication skills a rigorous clerkship demands. He will make an excellent law clerk. I recommend him to you with great enthusiasm.

Sincerely,



Vicki Been

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF CRIMINAL JUSTICE
PUBLIC INTEGRITY BUREAU

April 27, 2023

Your Honor:

My name is Russell Satin, Senior Counsel in the Public Integrity Bureau of the New York State Office of the Attorney General. I have had the pleasure of supervising Justin Korman during his 2023 Spring Externship in our bureau and highly recommend him for a clerkship position. His critical thinking and precise analysis allow him to perform exceptionally well in every task he is given, and these traits will be assets for him as a clerk.

During our time working together, Justin impressed me with his enthusiasm for public service and his commitment to always producing high quality work. Rather than simply complete assignments, Justin always shows a genuine interest in the overall success of each case and is continuously asking questions and probing for more information. His ceaseless pursuit of answers and understanding demonstrates a quick legal mind and will serve him well in his career. Justin produced an excellent memo on a divisive legal topic pertaining to the constitutionality of long-term surveillance operations; he writes with clarity and a well-structured style.

As is clear from his resume and transcript, Justin is an intelligent young man who has sought out work experiences which will provide a wealth of knowledge for him to rely on moving forward. On a personal level, I found Justin to be a thoughtful and engaging individual to have in the office. Despite only being in the office two days each week, Justin ingratiated himself into the fabric of the bureau and appeared at ease in all settings, whether it be witness interviews or in court. I believe Justin is a great candidate for a clerkship position. He has the dedication and drive to meet and exceed your high standards, and the requisite skills to excel in this role. I recommend him without reservation.

I would be happy to discuss more of Justin's work or offer additional information. You can reach me at 212-416-8268 or Russell.Satin@ag.ny.gov.

Regards,

_____

Russell Satin, Esq.
Senior Counsel, Public Integrity Bureau

28 LIBERTY STREET, NEW YORK, NY 10005 ● PHONE (212) 416-6020 ● FAX (212) 416-8026 ● WWW.AG.NY.GOV

Embarrassing the Future: How Pole Cameras Threaten the Fourth Amendment

Justin Korman

Introduction

> "One day, in a not-so-distant future, millions of Americans may well wake up in a smart-home-dotted nation. As they walk out their front doors, cameras installed on nearby doorbells, vehicles, and municipal traffic lights will sense and record their movements, documenting their departure times, catching glimpses of their phone screens, and taking note of the people that accompany them. These future Americans will traverse their communities under the perpetual gaze of cameras."[1]

In *Carpenter v. United States*, the Supreme Court held that the seizure of seven days of historical cell-site location information (CSLI), which maps a subscriber's location as their smartphone connects to nearby cell towers, is a "search" under the Fourth Amendment.[2] The Court established that an individual has a legitimate privacy interest in the data, collected and aggregated by wireless carriers.[3] In turn, the government is barred from accessing a week's worth or more of CSLI without a warrant.[4] *Carpenter* gave color to the "reasonable expectation of privacy" test promulgated in *Katz v. United States* and used by the Court to determine a search for over half a century.[5] *Carpenter* also refused to apply *Smith v. Maryland*'s third-party doctrine, which held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[6] The decision to limit law enforcement's ability to use modern tracking technology has the potential to redefine prior Court precedent, expand privacy

[1] *United States v. Tuggle*, 4 F.4th 505, 509 (7th Cir. 2021).
[2] *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
[3] *Id*. at 2217.
[4] *Id*. at 2221.
[5] *Katz v. United States*, 389 U. S. 347 (1967).
[6] *Smith v. Maryland*, 442 U.S. 735 (1979).

protections, and hamper criminal investigations. But Chief Justice Roberts, delivering the opinion of the Court, was careful to cabin *Carpenter*'s holding to the specific technology in the case, writing that "the Court must tread carefully in such cases, to ensure that we do not 'embarrass the future.'"[7]

This Paper examines the constitutionality of warrantless pole camera surveillance of a residence through the lenses of two federal circuit court cases: *United States v. Tuggle*, a unanimous Seventh Circuit holding that eighteen months of pole camera surveillance was not a search; and *United States v. Moore-Bush*, a fractured *en banc* First Circuit decision in which three judges found that eight months of such surveillance was a search. The Paper first summarizes the path to *Carpenter*, a brief tour of recent Fourth Amendment jurisprudence. It notes the Court's particular sensitivity to the evolution of technology, and how that sensitivity permeated the *Katz* test and the third-party doctrine. The Paper then distills the factors the Court relied on in establishing a privacy interest in CSLI, highlights post-*Carpenter* pole camera jurisprudence, and assesses how the *Tuggle* court and the *Moore-Bush* judges applied the *Carpenter* factors to pole camera surveillance. Finally, the Paper dissects the common thread running through *Carpenter*, *Tuggle* and *Moore-Bush*: judicial fears about a burgeoning surveillance state.

From *Katz* To *Carpenter*

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[8] In 1967, the Court held in *Katz v. United States* that government agents listening to a conversation that occurred in a

[7] *Carpenter*, 138 S. Ct. at 2220 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944)).
[8] U.S. CONST. amend. IV.

closed telephone booth conducted a search under the Fourth Amendment, unreasonable because it was done without a warrant.[9] The Court announced that "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[10] Justice John M. Harlan II wrote in concurrence that Katz had a "a reasonable expectation of privacy" in his phone booth conversations.[11] The Court adopted the "reasonable expectation of privacy" test a year later.[12]

The test has been shaped by advances in surveillance technology. In *Kyllo v. United States*, the Court ruled that the thermal imaging of a residence was a Fourth Amendment search, despite the fact that the images were obtained by police officers standing on a public street.[13] The Court warned that "a mechanical interpretation of the Fourth Amendment […] would leave the homeowner at the mercy of advancing technology."[14] Even when sanctioning law enforcement practices, the Court retained a healthy skepticism of technology. In *United States v. Knotts*, the Court held that the limited use of a radio transmitter to track a defendant's car was not a Fourth Amendment search.[15] But the court left the question open as to the constitutionality of round-the-clock electronic surveillance, at that time theoretical.[16] Less than thirty years later that surveillance became a reality, but the question was sidestepped again in *United States v. Jones*.[17]

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[9] *Katz*, 389 U.S. 347.
[10] *Id*. at 351.
[11] *Id*. at 360 (Harlan, J., concurring).
[12] *Terry v. Ohio*, 392 U.S. 1, 9 (1968) ("[W]herever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion." (citation omitted)).
[13] *Kyllo v. United States*, 533 U.S. 27 (2001).
[14] *Id*. at 35.
[15] *United States v. Knotts*, 460 U.S. 276 (1983).
[16] *Id*. at 283-84 ("Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the Government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.' But the fact is that the 'reality hardly suggests abuse'; if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." (citations omitted)).
[17] *United States v. Jones*, 565 U.S. 400 (2012).

The Court held that the use of a Global Positioning System (GPS) device to track a vehicle was unconstitutional not for failing the *Katz* test, but because police committed a physical trespass in installing the device.[18] However, four justices agreed in concurrence that longer-term GPS monitoring likely violated reasonable expectations of privacy, regardless of a physical trespass.[19] Justice Alito foreshadowed that "technology can change [reasonable privacy] expectations."[20]

The third-party doctrine also showed vulnerability to technological advances. In 1977, the Court held in *United States v. Miller* that a depositor did not have a reasonable expectation of privacy in financial statements and deposit slips, subpoenaed from his bank by the government.[21] The Court determined that information revealed to a third party, even on the assumption that it will be safeguarded, is not protected by the Fourth Amendment.[22] In dissent, Justice Brennan criticized the Court's reliance on third-party disclosure, writing that "[f]or all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account."[23] Nevertheless, the Court continued to extend the doctrine, upholding the constitutionality of pen registers in *Smith v. Maryland* on the basis that callers "assume the risk" that numbers they dial may be shared with law enforcement.[24] Justice Marshall lamented in dissent that individuals "have no realistic alternative" to using the telephone, and

[18] *Id*.
[19] *Id*. at 415 (Sotomayor, J., concurring); *Id*. at 430 (Alito, J., joined by Ginsburg, Breyer, and Kagan, JJ., concurring).
[20] *Id*. at 427 (Alito, J., concurring).
[21] *United States v. Miller*, 425 U.S. 435 (1976).
[22] *Id*. at 443.
[23] *Id*. at 451 (Brennan, J., dissenting).
[24] *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

"unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."[25]

The *Carpenter* Factors

In 2011, authorities zeroed in on Timothy Carpenter as a suspect in a series of Detroit-area robberies.[26] Federal prosecutors obtained Carpenter's CSLI from wireless carriers MetroPCS and Sprint, pursuant to a court order under the Stored Communications Act.[27] Unlike the probable cause required for a warrant, the Stored Communications Act merely requires prosecutors to show that the information sought "might be pertinent to an ongoing investigation."[28] Carpenter's CSLI generated 12,898 location points over 127 days; 101 points per day generated each time Carpenter received a call, text, or email, and when the phone automatically connected to a nearby cell tower to update news, weather, or social media feeds.[29] Using the location data, authorities generated maps that pinpointed Carpenter's phone at the scene of four robberies.[30] Carpenter was arrested and subsequently convicted on charges of robbery and carrying a firearm during a federal crime of violence.[31] Prosecutors said the incriminating CSLI "clinched the case."[32] Carpenter had moved prior to trial to suppress the CSLI evidence on Fourth Amendment grounds, but his motion was denied by the district court.[33] The denial was affirmed by the Sixth Circuit, and the Supreme Court granted certiorari.[34]

[25] *Id*. at 750 (Marshall, J., dissenting).
[26] *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).
[27] *Id*.
[28] *Id*. at 2208.
[29] *Id*. at 2220.
[30] *Id*. at 2212-13.
[31] *Id*.
[32] *Id*. at 2213.
[33] *Id*. at 2212.
[34] *Id*. at 2213.

The Court held that Carpenter had a reasonable expectation of privacy in his CSLI, meaning the government conducted a Fourth Amendment search by acquiring the records.[35] Since the government proceeded without a warrant supported by probable cause, the Court said, the search was unconstitutional.[36] Notably, the Court refused to apply the third-party doctrine, despite the fact that the records were kept by MetroPCS and Sprint, not Carpenter himself.[37] The Court did not announce a new test to replace *Katz*, but announced the factors that guided its inquiry: "[1] the deeply revealing nature of CSLI, [2] its depth [and] breadth, and [3] comprehensive reach, and the [4] inescapable and [5] automatic nature of its collection."[38]

The first factor, "the deeply revealing nature of CSLI," counseled in favor of a privacy interest because cell phones follow users through "private residences, doctor's offices, political headquarters, and other potentially revealing locales," divulging "familial, political, professional, religious, and sexual associations."[39] The second factor, the "depth [and] breadth" of CSLI, endangered privacy because the technology maps location at near "GPS-level precision," location data is comprehensive for many individuals who "compulsively carry cell phones with them all the time," and wireless carriers maintain up to five years of CSLI records for the government to access retrospectively.[40] And the third factor, the "comprehensive reach of CSLI," moved the Court because the data is collected on 400 million phones by carriers, so police can acquire records on anyone at little expense.[41]

[35] *Id*. at 2217.
[36] *Id*. at 2221.
[37] *Id*. at 2217 ("We decline to extend *Smith* and *Miller* to cover these novel circumstances.").
[38] *Id*. at 2223.
[39] *Id*. at 2217-18.
[40] *Id*. at 2218-19.
[41] *Id*. at 2233.

The final two factors foreclosed the application of the third-party doctrine. The fourth factor, the "inescapable" nature of the data, warranted an exception because carrying a cell phone is "indispensable to participation in modern society," so individuals can't feasibly opt-out from collection.[42] Finally, the fifth factor, the "automatic" nature of the data, made CSLI unique because data points were generated "without any affirmative act on the part of the user beyond powering up," merely from the phone being connected to the wireless network.[43] The factors together comprised a lack of "voluntary exposure," necessary to apply the doctrine.[44]

The Court, perhaps wary of the broader application of *Carpenter*, expressly limited its holding to CSLI, reserving questions of conventional surveillance techniques.[45] But the *Carpenter* framework can be (and already has been) applied beyond CSLI, by state and appellate courts nationwide. The Court has remained silent on these matters, while surveillance has continued and evolved.

Tuggle and *Moore-Bush*: The Facts

In July of 2021, the Court of Appeals for the Seventh Circuit held that eighteenth months of warrantless pole camera surveillance of a residence was not a Fourth Amendment search.[46] In August of 2014, government agents installed a pole camera in front of the home of Travis Tuggle, a suspected conspirator in a large methamphetamine distribution scheme.[47] Two more cameras were installed in 2015.[48] Incriminating footage supported Tuggle's indictment on

[42] *Id*. at 2220.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021).
[47] *Id*. at 511.
[48] *Id*.

distribution charges and the cameras were removed in March of 2016.[49] Before the case was appealed to the circuit court, the district court denied Tuggle's motion to suppress the pole camera evidence.[50] Judges Joel M. Flaum, David F. Hamilton, and Michael B. Brennan unanimously affirmed the district court's denial.[51]

Almost a year later in June of 2022, the Court of Appeals for the First Circuit sitting *en banc* deadlocked 3-3 on the issue of whether eight-month residential pole camera surveillance constituted a search under the Fourth Amendment.[52] Three judges, David J. Barron, John M. Thompson, and William J. Kayatta, concluded that the *Carpenter* factors justified a reasonable expectation of privacy "in the whole of the activities in the front curtilage of a home," prohibiting warrantless long-term surveillance.[53]

In May of 2017, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) installed a video camera on a utility pole across the street from the residence of their target, Daphne Moore-Bush, whom they suspected was trafficking in narcotics.[54] The government acted without probable cause or even a reasonable suspicion that a crime had been committed.[55] The camera captured "roughly half" of the home, including a side entrance and the front driveway, and it could be remotely zoomed, panned, and tilted.[56] In January of 2018, Ms. Moore-Bush and

[49] *Id*. at 511-12.
[50] *Id*. at 512.
[51] *Id*. at 511.
[52] *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022).
[53] *Id*. at 340 (Barron, C.J., joined by Thompson & Kayatta, JJ., concurring). This aligns with the only state supreme court to address the issue post-*Carpenter*. In *People v. Tafoya*, the Colorado Supreme Court held that three months of pole camera surveillance was a search under the Fourth Amendment. The court found that the surveillance was as intrusive as accessing CSLI data, if not more so. And the court noted that since pole cameras are "cheap and surreptitious," their abuse goes unchecked by limited resources and community hostility. *People v. Tafoya*, 494 P.3d 613 (2021).
[54] *Moore-Bush*, 36 F.4th at 322.
[55] *Id*. at 324.
[56] *Id*. at 323.

her mother (another resident and the owner of the house) were indicted for drug crimes and the camera was removed.[57] The defendants subsequently moved to suppress the footage on Fourth Amendment grounds.[58] The district court granted their motions, but a First Circuit panel reversed before the circuit agreed to rehear the case *en banc*.[59] All six judges agreed to deny the motion to suppress.[60] Judges Barron, Thompson, and Kayatta applied the good-faith exception to the Fourth Amendment's warrant requirement, reasoning that the government relied on pre-*Carpenter* circuit precedent authorizing the warrantless surveillance.[61] However, they analyzed the case in light of *Carpenter* and found, unlike their three colleagues, that the government conducted a search under the Fourth Amendment.[62]

In *Tuggle*, the judges quickly determined that the isolated use of pole cameras violated no privacy right and moved on to the "more challenging question," which was the long-term nature of the surveillance capturing Tuggle's activities in aggregate.[63] Despite reservations, the judges similarly found no unconstitutional search in the prolonged surveillance, articulating that the revealing nature, as well as the depth and breadth of the surveillance, did not reach the *Carpenter* threshold.[64] They admitted the comprehensive reach of the technology, but distinguished it from CSLI and questioned the application of *Carpenter* to the case.[65] Conversely, the *Moore-Bush* judges found that the deeply revealing nature of the curtilage activities, the depth and breadth of the eight months of footage, and the comprehensive reach of pole camera surveillance all

[57] *Id*. at 323-24.
[58] *Id*. at 324.
[59] *Id*. at 325-27.
[60] *Id*. at 320.
[61] *Id*. at 359-60.
[62] *Id*. at 359.
[63] *United States v. Tuggle*, 4 F.4th 505, 517 (7th Cir. 2021).
[64] *Id*. at 524.
[65] *Id*. at 525, 527.

legitimated a privacy interest.[66] Despite the inapplicability of the third-party doctrine, they also gave weight to the inescapable nature of the collection.[67]

Applying the *Carpenter* Factors

Tuggle and the *Moore-Bush* concurrence reach opposite conclusions within the same structure of the *Carpenter* factors. Each factor can be used to reconcile pole camera footage with CSLI, or provide support for why the footage should be classified differently. *Tuggle* focused on what pole cameras do not see, the gaps in surveillance when the target travels that are filled in by location data. *Moore-Bush* emphasized what pole cameras see clearer and for a longer period of time than seven days of CSLI.

On one hand, pole camera footage is less revealing than *Carpenter* in that it captures no record of the target's movements, both public and private, that are implicated in CSLI.[68] The cameras, located across the street from a residence, never see the businesses where the target shops, the houses of friends that he visits, or his public routines.[69] In contrast with CSLI, which shows every movement, investigators can only infer the target's lack of movement from the pole camera footage.[70] The activity in front of the home is an "important sliver of [the target's] life" but "pales in comparison" to Carpenter.[71]

On the other hand, the footage is deeply revealing because the surveillance targets the home, the "center of our lives" and the bedrock of Fourth Amendment protection.[72] "[I]t is where

[66] *Moore-Bush*, 36 F.4th at 340-41, 346, 347.
[67] *Id*. at 347.
[68] *Tuggle*, 4 F.4th at 524.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *United States v. Moore-Bush*, 36 F.4th 320, 346 (1st Cir. 2022).

we always return to, where our friends, family, and associates visit, where we receive packages and mail, and where we spend a good deal of time."[73] Pole camera surveillance can reveal more about the "familial, political, professional, religious, and sexual associations" cited in *Carpenter* than CSLI.[74] Unlike location data, pole cameras capture the target hosting controversial guests, like members of unpopular political parties or religious figures.[75] The "mosaic theory" of privacy, that a reasonable privacy interest in the aggregate can exist despite no privacy interest in a moment, hour, or even day of surveillance, was embraced by *Carpenter*.[76] Pole cameras see the life of a target, the aggregation of experiences – "from a parting kiss to a teary reunion to those moments most likely to cause shame" – as well as patterns of behavior left undiscovered by shorter-term surveillance.[77]

The breadth of the surveillance, while concerning, violates no line established by precedent or by Congress.[78] More importantly, the footage has limited depth because the immobile cameras lose track of the target every time he leaves his property.[79] It lacks the comprehensiveness of the CSLI data, where a phone functions as "an ankle monitor" never leaving the body of the target.[80] But the breadth of the surveillance is still self-evident: it continues for months, while the holding in *Carpenter* found a privacy interest in just seven days of CSLI.[81] The depth of the surveillance exists in live images as opposed to "a dot on a map

[73] *Id*.
[74] *Id*. (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).
[75] *Id*. at 337.
[76] *Id*. at 358. The *Tuggle* court did not believe they were bound to apply the mosaic theory, but analyzed Tuggle's claim under the mosaic theory anyway and found no search. *Tuggle*, 4 F.4th at 517, 523.
[77] *Id*. at 336.
[78] *United States v. Tuggle*, 4 F.4th 505, 526 (7th Cir. 2021). The judges also refused to set the boundaries themselves. "Drawing our own line, however, risks violating Supreme Court precedent and interfering with Congress's policy-making function, which would exceed our mandate to apply the law." *Id*.
[79] *Id*. at 524-25.
[80] *Id*. at 524 (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018).
[81] *Carpenter*, 138 S. Ct. at 2217 n.3.

[revealed by CSLI]," as well as in the accuracy of a comprehensive digital record that can be "mined" using visual search technologies like facial recognition to reveal even more information.[82]

The comprehensive reach of the technology lacks a retrospective quality arguably necessary to justify cabining its use.[83] The existing trove of CSLI collected and stored by wireless providers allows the government to "travel back in time" to surveil anyone, while investigators need to select each target *ex ante* before installing pole cameras.[84] The retrospectivity, not the hypothetical inability of police to replicate the surveillance by engaging in lengthy stakeouts, guided the Court's inquiry in *Carpenter*.[85]

But that inability underscores the potential of the technology to violate privacy. The analog to a pole camera is a team of officers conducting a round-the-clock stakeout, which rarely lasts longer than three weeks because it is laborious, expensive, and detectable.[86] But installing and monitoring the pole camera is cheap, efficient, and surreptitious.[87] The gulf between what surveillance is possible with this technology and what is possible without it is wider than in *Carpenter*.[88] With no legal preconditions to installation, the government can amass "a database containing continuous video footage of every home in a neighborhood, or for that matter, in the United States as a whole."[89]

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[82] *Moore-Bush*, 36 F.4th at 341, 346, 347.
[83] *Tuggle*, 4 F.4th at 525.
[84] *Id*.
[85] *Id*. at 526 ("To assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly monitor Tuggle's home for eighteen months defies the reasonable limits of human nature and finite resources.")
[86] *Moore-Bush*, 36 F.4th at 333-34.
[87] *Id*. at 341, 347.
[88] *Id*. at 344.
[89] *Id*. at 340.

Finally, the underlying conduct surveilled – entering and leaving a residence – is inescapable. Third-party doctrine does not apply to pole camera surveillance.[90] But substituting the public view as third-party proxy, there is no way to avoid disclosure beyond either "never leaving the house or enclosing the curtilage to make it effectively part of the inside of the house," both equally as unreasonable as not using a cell phone that compiles CSLI.[91] Even with financial resources, lesser countermeasures like a privacy fence or shrubbery only invite the government to raise the height of the camera.[92] The inescapability of pole camera surveillance is central to a vision of all-encompassing government surveillance, and applying it outside the context of third-party cases could be a way to head off particularly unsavory government tools that threaten a broader concept of liberty motivating the Fourth Amendment.

The Spectre of the Orwellian State

Outside of the purely legal realm, warrantless pole camera surveillance implicates important ethical and practical considerations. According to the *Carpenter* Court, the Framers of the Constitution drafted the Fourth Amendment "to place obstacles in the way of a too permeating police surveillance."[93] A warrant is the highest hurdle, the "ultimate measure of the constitutionality of a governmental search."[94] Having concluded that accessing the defendant's CSLI was a search in *Carpenter*, the Court also found that the government did not meet its evidentiary burden in order to obtain a valid warrant.[95] To get a warrant, the government would

[90] *Id*. at 344. The *Tuggle* court does not discuss the factors of inescapable or automatic disclosure, presumably cabining them to third-party cases.
[91] *Id*. at 347.
[92] *Id*. ("[T]he saying, 'show me a wall and I'll show you a ladder' comes to mind.").
[93] *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).
[94] *Id*.
[95] *Id*. at 2221.

have been required to show "probable cause," by no means a fixed target, but one that generally involves "some quantum of individualized suspicion."[96]

The *Tuggle* court did "sound a note of caution" regarding the potential of technological innovation to undermine Fourth Amendment protections.[97] Cameras did not exist to the Framers, but now they are so pervasive that no one blinks when the government uses them to solve crimes.[98] That shift in societal expectations "sparks the promethean fire," licensing the government to avoid constitutional accountability.[99] But the *Tuggle* court's understanding of precedent bound them to sanction the practice and defer to the Supreme Court and Congress in restoring privacy protections.[100] Courts confronting the constitutionality of long-term pole camera surveillance of a residence have repeatedly invoked the danger of mass surveillance unconstrained by probable cause or individualized suspicion. Judicial inaction "unlocks the gate to a true surveillance society,"[101] "transform[s] what once seemed like science fiction into fact,"[102] and "raises the spectre of the Orwellian state."[103]

The ghost of China, deemed by the intelligence community to be America's greatest threat, likely comes to mind.[104] The judges in *Moore-Bush* quoted a *New York Times* article detailing the Chinese surveillance apparatus, "a blueprint for how to build a digital totalitarian

[96] *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).
[97] *United States v. Tuggle*, 4 F.4th 505, 527 (7th Cir. 2021).
[98] *Id*.
[99] *Id*.
[100] *Id*. at 528.
[101] *State v. Jones*, 903 N.W.2d 101, 112 (2017).
[102] *Tuggle*, 4 F.4th at 509.
[103] *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).
[104] Julian E. Barnes & Edward Wong, *U.S. Spy Agencies Warn of China's Efforts to Expand Its Power*, N.Y. TIMES (Mar. 8, 2023), https://www.nytimes.com/2023/03/08/us/politics/china-us-intelligence-report.html ("The People's Republic of China, which is increasingly challenging the United States economically, technologically, politically and militarily around the world, remains our unparalleled priority," [Director of National Intelligence Avril] Haines said.).

state."[105] In provinces like Zhengzhou, Guizhou, Zhejiang, and Henan, facial scans on apartment doors have replaced key cards.[106] Police use thousands of cameras to track the location of Hong Kong sympathizers, migrant workers, ethnic minorities, and the mentally ill.[107] Criminal investigation has never been easier in China but abuse is rampant when, as one Chinese citizen put it, "[l]aw-enforcement officers of low moral stock have high-tech weapons."

The same high-tech weapons operate in the hands of allies, who are weighing how to deploy them without sacrificing democratic ideals of freedom and privacy. London, England has more closed-circuit television cameras than any other city except Beijing, but privacy groups see a lack of accountability in how the technology is used and shared.[108] Japan's electronic surveillance infrastructure is tracking people with dementia to save lives and give families peace of mind, but even proponents worry about the government tracking all of its "problem people."[109] The United States is having the same debates amidst a rise in surveillance, illustrated by several notable examples in local law enforcement. In 2016, Baltimore police used aerial surveillance planes to survey neighborhoods and monitor signs of civil unrest in the wake Freddie Gray's death.[110] In 2019, Amazon's doorbell camera company Ring partnered with over 400 law enforcement agencies to facilitate access to user footage.[111] Ring gave police

[105] Paul Mozur & Aaron Krolik, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, N.Y. TIMES (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/technology/china-surveillance.html.
[106] *Id.*
[107] *Id.*
[108] Adam Satariano, *Real-Time Surveillance Will Test the British Tolerance for Cameras*, N.Y. TIMES (Sep. 17, 2019), https://www.nytimes.com/2019/09/15/technology/britain-surveillance-privacy.html.
[109] Ben Dooley & Hisako Ueno, *Where a Thousand Digital Eyes Keep Watch Over the Elderly,* N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/business/japan-elderly-surveillance.html.
[110] Kris Van Cleave, Big Brother? U.S. company's aerial surveillance technology raises questions, C.B.S. NEWS (Aug. 24, 2016), https://www.cbsnews.com/news/persistent-surveillance-systems-aerial-surveillance-technology-raises-questions/.
[111] Caroline Haskins, *Everything You Need to Know About Ring, Amazon's Surveillance Camera Company*, VICE (Aug. 8, 2019), https://www.vice.com/en/article/qvg48d/everything-you-need-to-know-about-ring-amazons-surveillance-camera-company.

departments free cameras to distribute in their communities and taught officers how to persuade citizens to give them access to their video feeds.[112] Later in 2019, the Detroit housing authority installed cameras in front of entryways to public housing units in a collaboration with police.[113] Detroit police, like their Chinese counterparts, utilized facial recognition software to identify individuals at the residences.[114] In response to the threat posed, multiple cities have banned facial recognition software, wary that Big Brother is spying on the innocent.[115] As the home, "first among equals" in deserving Fourth Amendment protection, is being watched, judges have to tackle concerns about an imbalance between security and liberty.[116] They also need to consider another essential question: who is watching?

That answer implicates China as well. The Chinese government has been accused of hijacking cameras to monitor the United States. In 2019, the U.S. intelligence community determined their counterparts in Beijing were likely hacking Chinese-made Huawei cameras, installed on American cell towers to monitor traffic and weather but incidentally providing a view of U.S. military bases and missile silos.[117] Hikvision, another Chinese company bankrolled by Xi Jinping's government, supplied cameras to police departments in Tennessee, Peterson Air Force Base in Colorado, and U.S. embassies abroad.[118] A 2021 search determined Hikvision, whose motto is "See far, go further," had 750,000 internet-connected cameras active in the United States, two years after President Trump signed a law prohibiting federal agencies from

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[112] *Id*.
[113] Lola Fadulu, *Facial Recognition Technology in Public Housing Prompts Backlash*, N.Y. TIMES (Sep. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/facial-recognition-technology-housing.html.
[114] *Id*.
[115] *Id*.
[116] *Florida v. Jardines*, 569 U.S. 1, 6 (2013).
[117] Katie Bo Lillis, *CNN Exclusive: FBI investigation determined Chinese-made Huawei equipment could disrupt US nuclear arsenal communications*, CNN (Jul. 25, 2022), https://www.cnn.com/2022/07/23/politics/fbi-investigation-huawei-china-defense-department-communications-nuclear/index.html.
[118] Jonathan Hillman, *China Is Watching You*, THE ATLANTIC (Oct. 18, 2021), https://www.theatlantic.com/ideas/archive/2021/10/china-america-surveillance-hikvision/620404/.

contracting with the company.[119] The notion that the cameras helping police solve crimes in Lawrence, Massachusetts, are the same cameras facilitating the crackdown against Muslim Uyghurs in Xinjiang is an uncomfortable commonality and a grave national security concern.[120] The construction of the American surveillance state in a connected world means that citizens and judges willing to trust authorities in wielding the weapons also need to trust that the weapons are secure from other prying eyes. That is a considerable leap of faith, especially considering the cost-conscious security tradeoffs the government has already made.

Conclusion

The *Carpenter* decision was a manifestation of judicial discomfort with the rapid evolution of surveillance technology. Carpenter retrofitted the *Katz* test to account for technological advances in cell phone tracking data without making an overbroad ruling about other methods of surveillance. Pole cameras are the next Fourth Amendment battleground, and *Tuggle* and *Moore-Bush* demonstrate both the potential and the limitations of the *Carpenter* framework in curbing other forms of technology-aided surveillance. *Tuggle* shows how *Carpenter* could be circumscribed to tracking technology, retrospective data collection, or cases that involve third-party disclosure. The *Moore-Bush* concurrence presents *Carpenter* as a holistic inquiry skeptical of any technology that contravenes traditional expectations of privacy.

A common motif shared by *Carpenter*, *Tuggle*, and *Moore-Bush* is a fear of the surveillance state. An American surveillance state threatens liberty, warranting uncomfortable comparisons to autocratic regimes like China. It also concentrates power in a way that can be exploited to threaten the safety of Americans, even if the government builds the network with

[119] *Id.*
[120] *Id.*

good intentions. The courts see themselves as the stewards of the spirit of the Fourth Amendment, the last barricade against *Minority Report*-esque policing after citizens grow tolerant of, or perhaps even comfortable with, the government's effective methods.

Both *Tuggle* and *Moore-Bush* say little about the Court's fear of embarrassing the future, and more about the potential for the Court to be embarrassed by the future. They warn that judicial inaction will not slow the proliferation of pole cameras or the maturation of the technology. Citizens may accept the reality of continuous surveillance once they step outside their front door, but the Supreme Court cannot punt on ideological and pragmatic questions that need to be answered before pole cameras become ubiquitous in American society. Until a pole camera case is granted certiorari, lower courts will continue to read the tea leaves of *Carpenter* while the surveillance state expands in the background.

Applicant Details

First Name	**Nicholas**
Last Name	**Smith**
Citizenship Status	**U. S. Citizen**
Email Address	**nbsmith@uchicago.edu**
Address	**Address** Street **5105 S Harper Ave, Unit 0512** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**443-742-5619**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Baird, Douglas
dbaird@uchicago.edu
Casey, Anthony
ajcasey@uchicago.edu
773-702-9578
Conyers, Herschella
hconyers@uchicago.edu
(773) 576-5076

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICHOLAS SMITH
5105 S. Harper Ave, Unit 0512, Chicago IL 60615 | (443) 742-5619 | nbsmith@uchicago.edu

The Honorable Kenneth M. Karas
United States District Court for the Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533, White Plains, NY 10601-4150

Dear Judge Karas,

I am a rising third-year law student at the University of Chicago Law School, and I am writing to update my application for a clerkship in your chambers for the 2025 term. Since first submitting my application, I have secured a 2024 clerkship with the Honorable Danny J. Boggs on the Sixth Circuit Court of Appeals. Accordingly, I am pleased to note that if hired, I would now be coming to your chambers with a full year of prior clerkship experience. Finally, as I mentioned in my initial cover letter, as someone who hopes to work as a public interest lawyer in New York, I remain extremely excited for the possibility to work for and learn from a like-minded judge such as yourself, who clearly values public interest work as highly as I do.

I have known since before starting law school that I ultimately want to pursue a career in public interest work and have actively sought as wide a variety of such experiences as possible—first at the U.S. Attorney's Office for the Eastern District of New York in Brooklyn, then at my law school's Criminal and Juvenile Justice Clinic, and currently as a Consumer Protection intern at Legal Aid Chicago. In each job, I've found the most fulfillment when mastering a complex statutory scheme or factual record, then clearly conveying the essential information to my audience. At the prosecutor's office, this included explaining to my bosses when death threats against a witness were admissible under the Federal Rules of Evidence. At the defense clinic, on the other hand, this meant combing through hours of body camera footage so I could show a judge the moment when our indigent client suffered a Fifth Amendment violation. As your judicial clerk, I would take this same passionate approach to fulfilling my professional assignments, not only to assist you, but also to serve the advocates, parties, and broader legal community who seek judicial clarification of the law.

I also believe that my previous professional experience as a literary translator has prepared me well for the demands of clerking. Translating both competitively and professionally has required me to develop writing skills, precise attention to detail, and the ability to communicate the ideas of others thoughtfully and effectively. More than anything else, it has taught me that agonizing for hours over relatively few words—whether in a poem, a brief, or a judicial opinion—makes a world of difference to one's audience. As a judicial clerk, I will bring this same detail-oriented mindset to whatever task I am assigned.

A resume, transcript, and writing sample are enclosed. Letters from Professors Baird, Casey, and Conyers will arrive under separate cover. Thank you for your consideration.

Sincerely,
/s/ Nicholas Smith

NICHOLAS SMITH
5105 S. Harper Ave, Unit 0512, Chicago IL 60615 | (443) 742-5619 | nbsmith@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D. Candidate, June 2024
Honors: Rubenstein Scholarship (full-tuition merit scholarship)
Activities: Criminal and Juvenile Justice Clinic; Moot Court; First Generation Professionals (board member); Chicago Law Foundation (board member)

Brown University, Providence, RI
B.A., *magna cum laude*, in East Asian Studies and Comparative Literature, May 2021
Honors: Phi Beta Kappa; Rosalie Colie Prize for Best Undergraduate Thesis in Comparative Literature (for translation of an Arabic murder mystery); 1st Prize, American Association for Teachers of Arabic National Translation Contest; Grand Prize, Brown University Chinese Speech Competition (Intermediate Level)

EXPERIENCE

United States Court of Appeals for the Sixth Circuit, Louisville, KY
Judicial Clerk to the Honorable Danny J. Boggs, 2024-2025

Legal Aid Chicago (Consumer Group), Chicago, IL
Intern, Summer 2023

- Conducted research and advised low-income Chicago residents on matters including bankruptcy, foreclosure, landlord-tenant disputes, predatory lending, and consumer fraud

United States Department of Justice, Eastern District of New York, Brooklyn, NY
Intern, Summer 2022

- Researched and wrote complete sections of motions arguing Fourth and Fifth Amendment issues on behalf of the federal government, in criminal prosecutions involving multinational narcotics conspiracies (*United States v. Garcia Luna*) and child trafficking
- Spoke in federal court before a judge on behalf of the government at plea and sentencing hearings

The University of Chicago Law School, Chicago, IL
Research Assistant, Summers 2021 and 2022

- Performed legal research and analysis for Professor Eric Posner on the intersection between antitrust law and labor markets, and the intersection between antitrust law and consumer protection
- Aided Professor Adam Chilton in his research by examining international labor treaties in Arabic, translating them, and summarizing them for quick reference by non-Arabic speakers

FT Culture Co., LTD., Beijing, China
Translator, 2020-2022

- Translated four official comic book adaptations based on the work of internationally renowned science-fiction author Liu Cixin (distributed domestically by Simon & Schuster)

LANGUAGES AND INTERESTS

Fluencies: Mandarin Chinese, Modern Standard Arabic, Classical Arabic
Interests: Marathon running; bass guitar

NICHOLAS SMITH
5105 S. Harper Ave, Unit 0512, Chicago IL 60615 | (443) 742-5619 | nbsmith@uchicago.edu

Two brief notes on the attached transcript:

First, as I am still an active student in Professor Conyers' Criminal and Juvenile Justice Clinic, I have not yet received a grade for this year's participation in the clinic. I will not receive one until graduating from law school in June 2024. The transcript reflects this.

Second, my independent bankruptcy research project with Professor Casey will not conclude until the end of this summer. I will not receive a grade for the resulting research paper until at least the end of September 2023.

THE UNIVERSITY OF CHICAGO

Name: Nicholas Blackburn Smith
Student ID: 12329009

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Brown University
Providence, Rhode Island
Bachelor of Arts 2021

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	177
LAWS	30711	Legal Research and Writing Michael Morse	1	1	180

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	181
LAWS	30411	Property Lee Fennell	4	4	182
LAWS	30511	Contracts Eric Posner	4	4	181
LAWS	30711	Legal Research and Writing Michael Morse	1	1	180

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	181
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	180
LAWS	43227	Race and Criminal Justice Policy Sonja Starr	3	3	183
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	179
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	181

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42201	Secured Transactions Douglas Baird	3	3	179
LAWS	44121	Introductory Income Taxation Julie Roin	3	3	179
LAWS	53271	Intensive Contract Drafting Workshop Emily Underwood Michelle Drake	3	3	178
LAWS	53445	Advanced Criminal Law: Evolving Doctrines in White Collar Litigation	3	3	179
Req Designation:		Meets Writing Project Requirement Thomas Kirsch			
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	0	
LAWS	95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	181
LAWS	43234	Bankruptcy and Reorganization: The Federal Bankruptcy Code Anthony Casey	3	3	182
LAWS	43242	Corporate Tax I David A Weisbach	4	4	181
LAWS	45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	177
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	0	

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	183
LAWS	42801	Antitrust Law Eric Posner	3	3	177
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	175
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	0	
LAWS	93499	Independent Research: Independent Advanced Bankruptcy Research Anthony Casey	3	0	

End of University of Chicago Law School

Date Issued: 06/07/2023

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation

Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 East 60th Street | Chicago, Illinois 60637
phone 773-702-9571 | fax 773-702-0730
e-mail douglas_baird@law.uchicago.edu
www.law.uchicago.edu

Douglas G. Baird
Harry A. Bigelow Distinguished Service Professor of Law

June 10, 2023

The Hon. Kenneth M. Karas
United States District Court for the Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

Nicholas Smith is a remarkably gifted young lawyer, and I welcome the chance to write a letter to you on his behalf as he applies for a clerkship.

A consummate puzzle solver, Mr. Smith was completely at home in my secured transactions class last fall. Mr. Smith finds genuine pleasure in confronting a complicated fact pattern with multiple parties in different jurisdictions claiming priority to the same asset, something that brings terror even to experienced lawyers.

In contrast to many of his generation, Mr. Smith is also a wordsmith. He takes care to find exactly the right word to capture the essence of whatever needs to be described. These skills served him well as a professional translator, and they undergird his remarkable skill at explaining the toughest puzzles that complicated statutory and regulatory regimes present. Hard problems seem much easier once he offers his perspective on them.

In person you will find Mr. Smith low-key and winning, someone keenly interested in everything around him. He prefers complex and interwoven stories to the simple ones. He has the patience, work ethic, and general good nature of someone you want to have at your side in solving a hard problem.

Success will come to Mr. Smith wherever he plys his gifts, and he will be an outstanding law clerk. I can recommend him to you enthusiastically and without reservation.

Sincerely,

Douglas G. Baird

Professor Anthony J. Casey
Deputy Dean, Donald M. Ephraim Professor of Law and Economics,
Faculty Director, The Center on Law and Finance
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
ajcasey@uchicago.edu | 773-702-9578

June 09, 2023

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I write to provide my strong recommendation for Nick Smith for a clerkship in your chambers. I had the pleasure of teaching Nick in my Bankruptcy class this winter, where he got one of the highest grades in the class. In and out of class, Nick has consistently displayed exceptional dedication, intellectual ability, and a deep commitment to the study and future practice of law.

Nick's unique background and diverse range of experiences have shaped his legal perspective. His undergraduate degree, obtained *magna cum laude* from Brown University, reflects his passion for East Asian Studies and Comparative Literature. I have no doubt that his linguist studies and translation work in Arabic and Chinese have contributed to his success in law school as both require one to navigate complex linguistic and cultural puzzles.

Beyond his academic and professional achievements, Nick possesses exceptional interpersonal skills and demonstrates a strong commitment to public interest work. He actively participated in the Criminal and Juvenile Justice Clinic, displaying his dedication to advocating for the underprivileged and marginalized. His involvement in organizations such as the First Generation Professionals and the American Constitution Society further exemplifies his commitment to public interest and promoting constitutional principles.

I have no doubt that Nick will be a highly valuable addition to your chambers. His enthusiasm for the law, dedication to excellence, and ability to adapt to diverse situations make him an ideal candidate for any chambers. I recommend Nick with the highest praise.

Please let me know if I can be of further assistance.

Very truly yours,
Anthony J. Casey

June 08, 2023

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Re: Clerkship Recommendation for Nicholas Smith

Dear Judge Karas:

I am writing to recommend Nicholas Smith for a clerkship. I am confident that he would be an outstanding clerk. Nick is a smart and conscientious young man and would be an asset to any court.

Nick joined my Criminal & Juvenile Justice Clinic at the University of Chicago Law School in Fall 2022. I have had weekly contact with and observation of Nick through team and individual meetings. I have reviewed his written work of draft motions, memorandum, and witness examinations. All have been excellent.

Nick has worked on several of our most difficult cases. In one case our client is charged with multiple counts of unlawful possession of a firearm. Nick drafted the motion to suppress statements. In preparing to draft the motion, Nick reviewed multiple times the body-camera footage of the police interactions with our client. His appreciation and grasp of the Miranda issues was obvious in his first draft. Nick's structuring of the legal argument was excellent. His writing was clear and concise.

Nick also helped moot 3L students who were preparing to argue the motion in court. His feedback was direct and on the money.

Nick's other work has included working as part of a larger team on a juvenile matter. Our client is charged with aggravated sexual assault. Nick has been meticulous, thoughtful, and timely in contributing to trial strategies, witness' preparations including expert witnesses, client meetings and overall case preparation. I look forward to his continued work on these and other cases in the upcoming school year.

In addition to his direct representation work, Nick has been instrumental in helping me develop a topic proposal for an upcoming article. His thoughtful insights into the pros and cons have helped direct my decisions.

Nick has also been part of a team that tracks legislation and policy issues in juvenile justice. Students attend meetings with speakers, legislators, and other stakeholders. These meetings are presented by the Juvenile Justice Initiative (JJI) and are instrumental in keeping me and the clinic informed and up to date.

Nick's ability to work well with others is outstanding. He actively listens and gives thoughtful feedback which allows discussions to move forward in a positive way.

As I have said, Nick will be returning to the clinic for his 3L year. My expectation is that he will assume even more responsibility and a greater leadership role.

To summarize, I recommend Nicholas Smith without reservation. Please feel free to contact me with any questions or follow-up. My best contact number currently is my cell number: 773.576.5076.

Sincerely,

/s/ Herschella G. Conyers

Herschella G. Conyers
Lillian E. Kramer Clinical Professor of Law
Director: Criminal & Juvenile Justice Clinic

NICHOLAS SMITH
5105 S. Harper Ave, Unit 0512, Chicago IL 60615 | (443) 742-5619 | nbsmith@uchicago.edu

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The attached writing sample is a mock Supreme Court opinion that I wrote as the final paper for the course "Advanced Criminal Law: Evolving Doctrines in White Collar Litigation" taught by the Honorable Judge Thomas Kirsch in Autumn 2022.

The assignment was to write a majority and a dissenting opinion in a hypothetical case that addressed the following two questions: 1) whether 18 U.S.C. § 666 requires a quid pro quo, and 2) whether the fictional district court appropriately calculated a loss for sentencing enhancement purposes. To create a 13-page writing sample, I included only the portion of the majority opinion discussing the § 666 issue, and omitted the dissent and the portion of the majority opinion covering the sentencing issue. The facts section is an edited excerpt of the paper prompt, which I included in my submitted final paper. This work is entirely my own and has not been edited by anyone other than myself.

SUPREME COURT OF THE UNITED STATES

No. 23-415

JAMES L. HORAN, PETITIONER *v.* UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

February 20, 2023

JUSTICE SMITH delivered the opinion of the Court.

Jim Horan, a city official, helped businessman Nick Simonton win a city contract worth $10 million. Unbeknownst to the city, Simonton was Horan's friend, and had previously given him over $300,000 before bidding on the contract. Horan was convicted for federal programs bribery under 18 U.S.C. § 666, and honest services fraud under 18 U.S.C. § 1346. On appeal, Horan contends the prosecution was required to prove a *quid pro quo* at trial to convict him under § 666. Because the language of § 666 is ambiguous and potentially raises serious constitutional and lenity concerns, we agree with Horan that the statute must contain a *quid pro quo* requirement. Accordingly, we VACATE Horan's conviction under § 666 and REMAND for proceedings consistent with this opinion.

I.

In 2010, the city council of Paducah, Kentucky appointed Jim Horan to serve as Commissioner of the city's Fire Department. Throughout Horan's tenure, the Fire Department received at least $50,000 annually in

federal funds. Concurrent with his government employment, Horan maintained a side job: a catering company called Down Home D-Lites.

During his tenure as Commissioner, Horan befriended Nick Simonton, a local businessman who owned and operated Havis Industries, a distributor of emergency radio systems. Simonton would go on to hire Horan's catering company for several business and personal events, including a company barbecue and an anniversary party for Simonton's parents.

Eventually, the city of Paducah decided to replace its emergency radio network. As Fire Commissioner, Horan immediately recommended Havis Industries (his friend's company) for the job, and the city awarded Havis the contract before ever putting it out for competitors to bid on. At the time of the contract award, some council members were aware of Horan's catering business; none, however, knew of any relationship between Horan and Simonton.

After viewing Horan's bank accounts during an unrelated investigation, the F.B.I. indicted Horan on counts of federal programs bribery under 18 U.S.C. § 666, and honest services fraud under 18 U.S.C. § 1346.

At trial, the government brought evidence that Simonton and Havis (his company) paid Down Home D-Lites more than $300,000 over time, an amount which constituted more than 85% of Horan's total catering revenue. Simonton and Havis also sometimes paid as much as 200% above market rate for dishes from Horan's business. Moreover, the government showed that in addition to the catering payments, Simonton regularly invited Horan to professional football games and concerts and provided box-seat tickets to these events.

At trial, the jury convicted Horan on all counts. In the district court's jury instructions for the § 666 count, the court did not tell the jury it needed to find a *quid pro quo* to convict Horan.

On appeal, the Sixth Circuit affirmed in full. We granted certiorari to resolve a longstanding circuit split, namely whether 18 U.S.C. § 666 contains an implicit *quid pro quo* requirement.

II.

Whether 18 U.S.C. § 666 requires a *quid pro quo* is the source of much disagreement among the Courts of Appeals. On one side, most of the Circuits have found that the statute contains no such requirement. *See, e.g., United States v. Ganim,* 510 F.3d 134, 150 (2d Cir. 2007); *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010). On the other side of the divide, an opposing contingent has emerged in recent years, advocating that the language of § 666 clearly implies and requires a *quid pro quo*. *See, e.g., United States v. Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013); *United States v. Jennings*, 160 F.3d 1006, 1015 & nn.3–4 (4th Cir. 1998); *United States v. Hamilton*, 46 F.4th 389, 398 (5th Cir., 2022).

For the reasons stated within, we chart something of a middle course between these options in holding that the language of § 666 does not clearly mandate one result or the other. Instead, after viewing the statute in its proper historical and linguistic context, it is clear to us that § 666 is ambiguous. Although any bribery criminalized under the statute clearly requires a *quid pro quo*, § 666's use of the term "rewarded" may also criminalize gratuity, an offense with no such requirement.

However, while this construction of § 666 is ultimately plausible, it would also purport to grant the federal government a degree of punitive authority that raises significant constitutional and lenity concerns. To construe the statute in a way that avoids these issues, we must adopt the narrower construction of the statute, and find that § 666 criminalizes bribery alone. And since this narrower interpretation necessarily entails a *quid pro quo*, we rule in favor of petitioner in finding that § 666 contains a *quid pro quo* requirement.

A.

Because the correct construction of a statute is a pure question of law, our standard of review is *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947, (1995). And as in all questions of statutory interpretation, we begin our analysis of § 666 with the statute's plain text. *Limtiaco v. Camacho*, 549 U.S. 483, 488, (2007). The relevant portions of § 666 read as follows:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> …
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more;
>
> …

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a)–(b).

As respondent indicates, the words "*quid pro quo*" appear nowhere in § 666's plain text. Indeed, many of the Courts of Appeals who have found no *quid pro quo* requirement have halted their analyses at this early point. These courts reason that, because the statute does not explicitly mention a *quid pro quo*, it cannot possibly require one. *See, e.g.*, *United States v. Agostino*, 132 F.3d 1183, 1191 (7th Cir. 1997). Although this theory has some appeal, we would be more inclined to adopt it if § 666 had been enacted in isolation, with no strong textual or historical connection to any other statute. However, § 666 does, in fact, share such a connection. It directly grew in large part from a preexisting statute: 18 U.S.C. § 201, the general federal bribery provision. Any attempt to interpret § 666's requirements will therefore fail if we do not first explore its relationship with § 201.

B.

18 U.S.C. § 201 forbids corruption among "public officials." Corrupt dealings can fall into one of two categories: bribery under § 201(b), or gratuity under § 201(c). *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

In *Sun-Diamond*, we clarified that § 201(b) bribery, with its "intent to influence" language, hinges on a *quid pro quo*, i.e., a direct exchange of illegal payment for corrupt government action. 526 U.S. at 404. Consider, for example, the case of a drug ring that pays mail workers to intercept drug shipments at the post office engages in *quid pro quo* by swapping payment for government action, and thus violates § 201(b). *United States v. Jones*, 993 F.3d 519 (7th Cir. 2021). Gratuity, on the other hand, suggests a unilateral transaction, where an official merely accepts a gift when they should not. In *Jones*, if the drug traffickers had instead sent the postal workers some money without attempting to influence their behavior, they might still have satisfied some elements of a gratuity.[1]

For a time, § 201 was the only general bribery provision in the federal criminal code. *Salinas v. United States*, 522 U.S. 52, 58 (1997). Until 1984, some Circuits allowed corruption charges against both federal *and* state government officials under § 201, but we clarified that this practice was error in *Dixson v. United States*, 465 U.S. 482, 499 (1984). Recognizing that it would need another statutory tool to reach corrupt state and local officials, Congress began drafting a new statute before *Dixson* was decided, and enacted § 666 in 1984. *Salinas,* 522 U.S. at 58. While drafting the statute, Congress could have written the text of § 666 wholly from scratch. If it had done so, we would agree with respondent that the statute should be read in relative isolation. But instead, Congress clearly went beyond drawing

[1] Gratuities must meet other requirements to transform from legal gifts into illicit payments, but these are not strictly relevant to our discussion here. For a more thorough explanation, *see Sun-Diamond*, 526 U.S. at 412.

mere *inspiration* from § 201; it drew directly upon § 201's *text*.

When § 666 was enacted, its key language was identical to that of § 201(c), the preexisting gratuity provision. § 666's original text targeted a recipient of federal funds who "accepts…anything of value from a person or organization other than his employer…*for or because* of the recipient's conduct…" Comprehensive Crime Control Act, Pub. L. No. 98–473, § 1104(b), 98 Stat 1837, 2143-44 (1984) (emphasis added). As we explained in *Sun-Diamond*¸ it is precisely the words "for or because" in § 201(c) that make it a gratuity provision, because they do *not* contemplate a *quid pro quo* exchange, and thus do not cover bribery. 526 U.S. at 404. If § 666 had remained in this form until the present day, it would clearly not require a *quid pro quo*.

Instead, Congress amended § 666 in 1986, and swapped the language resembling § 201(c) for the statute's current language, resembling § 201(b). *See* Pub. L. No. 99–646, 100 Stat. 3592 (1986). § 666 now requires that an individual convicted under the statute corruptly "accepts… anything of value from any person, *intending to be influenced* or rewarded in connection with any business, transaction, or series of transactions." 18 U.S.C. § 666(a)(1)(B). Again, *Sun-Diamond* clarified that it was these very words – "intending to be influenced" – that create § 201(b)'s *quid pro quo* requirement. 526 U.S. at 404. In short, the amendment to § 666 removed words from the statute that clearly signify a gratuity, and replaced it with words that signify the more stringent *quid pro quo* bribery standard.

Respondent contends that just because words implying a *quid pro quo* were taken from § 201(b) and used in § 666, it does not follow that the *quid pro quo* requirement survived the transfer. But in the timeless words

of Justice Frankfurter, "If a word is obviously transplanted from another legal source...it brings the old soil with it," Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Our goal as interpreters of statutes is to understand their ordinary public meaning. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). And when Congress takes language that it knows has an established meaning and transplants it elsewhere, it would be foolish to assume the words do not carry the same connotations in their new home. *See, e.g., Hall v. Hall,* 138 S. Ct. 1118, 1128 (2018). Here, Congress took language it knew did *not* signify *quid pro quo,* and then replaced it with language it had previously used when it *did* want to signify *quid pro quo*. We need not speculate on the reason for doing so; we merely hold that Congress spoke clearly when it imported § 201(b)'s language and the accompanying *quid pro quo* requirement into § 666.

C.

At the very least, then, prosecutors pursuing a bribery theory under § 666 should be held to the same standard that § 201(b) requires, i.e., proving a *quid pro quo*. The question remains whether the language of § 666 also supports a gratuity theory. Because gratuities do *not* require *quid pro quo*, and respondent pursued a gratuity theory at trial, petitioner's conviction might still stand if § 666 criminalizes both bribery *and* gratuity.

In fact, § 201(b) and § 666 are not identical. § 666 adds two words to its intent requirement that § 201(b) lacks: where § 201(b) merely prohibits accepting money in return for "being influenced," (18 U.S.C. § 201(b)(2)(A)), § 666 forbids accepting payment while intending to "be influenced *or rewarded*." 18 U.S.C. § 666(a)(1)(B) (emphasis added). Under respondent's reading of the statute, the word "reward" signifies gratuity; in other

words, § 666 covers all of the same criminal conduct that § 201 does, but where § 201 uses an entire section to discuss the offense, § 666 uses only two words.

Can the single term "reward" truly signify a gratuity? Respondent cites to our opinion in *Sun-Diamond*, where we opined that "illegal gratuity, on the other hand, may constitute merely a *reward* for some future act." 526 U.S. at 405 (emphasis added). Respondent also provides dictionary definitions for the disputed term that it argues do not contemplate *quid pro quo* or an intent to influence, such as "*Reward*: A recompense or premium offered or bestowed by government or an individual in return for special or extraordinary services to be performed…" Black's Law Dictionary (5th ed. 1979). We concede that these contexts represent some instances which "reward" does not imply *quid pro quo*.

But while reward may not *always* imply an intent to influence, we disagree that it *never* does. Consider the fact that throughout American history, the government has offered "rewards" for information leading to the capture of fugitives. After the 1865 assassination of President Lincoln, for example, the War Department published advertisements promising a "$100,000 Reward!" to anyone who apprehended John Wilkes Booth and his conspirators. James L. Swanson, Manhunt: The 12-Day Chase for Lincoln's Killer (2006). In doing so, the Department surely intended to *influence* American citizens into joining the hunt for fugitives, rather than give whoever captured Booth a thank-you present. So too with bribery: a company might offer to "reward" a public official for every contract the official steers to the company, and in doing so engage in *quid pro quo* bribery.

Accordingly, the First Circuit has persuasively explained § 666's "influence or reward" language may merely be describing two flavors of bribery, rather than

both bribery and gratuity. "Influence" would refer to a situation in which an official received payment, then engaged in action on the payor's behalf; "reward" would suggest a situation where the official was promised payment, but received it only *after* acting. *United States v. Fernandez,* 722 F.3d 1, 23 (1st Cir. 2013).

Because this theory of "reward" as a term meaning "delayed *quid pro quo*" presents an equally compelling interpretation of the term as respondent's, we conclude that "reward" is an ambiguous term. A bounty hunter might seek his quarry in the hope of receiving a reward. Conversely, a grandparent might surprise their grandchild with a gift as a reward for graduating college. In the former case, "reward" suggests a delayed *quid pro quo*, and bribery; in the latter, it suggests something closer to a (legal) gratuity. As this issue poses a puzzle that textual interpretation alone cannot solve, we move to the last stage of our analysis: applying canons of statutory construction to dispel this ambiguity.

D.

We need only two such canons to aid us in our decision today. These are the canon of constitutional avoidance, and the rule of lenity. We begin with constitutional avoidance, "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Unfortunately for respondent, reading "reward" to encompass gratuity *does* raise serious constitutional questions. Though we have commented briefly on § 666's constitutionality in the past, we have never *considered* whether it would be constitutional for the federal government to regulate gratuities at the local level.

Congress's authority to enact § 666 stems from two provisions of the Constitution: "Spending Clause authority to appropriate federal moneys to promote the general welfare...and corresponding Necessary and Proper Clause authority…to assure that taxpayer dollars appropriated under that power are in fact spent for the general welfare…" *Sabri v. United States*, 541 U.S. 600, 605 (2004). In short, it is necessary and proper for Congress to control how its money is spent, including by punishing local officials for misusing federal funds.

Yet how does criminalizing *gratuity* under § 666 protect federal funds? The recipient of a gratuity does not act differently because of the payment; if they did, they would be influenced by the payment and therefore, by definition, be engaged in bribery. Unlike with bribery, it is unclear how gratuities pose any risk to the disbursement of federal funds. Such conduct may be criminal, but it may not be necessary and proper for Congress to police this corruption in place of state and local governments. *See McNally v. United States*, 483 U.S. 350, 360 (1987). In assuming Congress would not enact a constitutionally dubious statute, we must therefore construe "reward" in a way that is obviously constitutional, i.e., in a way that implies a delayed *quid pro quo*.

For similar reasons, respondent's preferred interpretation also fails under the rule of lenity, which "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). In arguing that "reward" encompasses both bribe and gratuity, respondent asks us to countermand this storied rule by giving the benefit of an ambiguous criminal statute to the prosecution, rather the defendant. Because doing so would violate "the fundamental principle that no citizen should be held accountable for a violation of a statute

whose commands are uncertain," we again reach the conclusion that respondent's chosen reading of the statute is untenable, and so rule for petitioner in holding that the term "reward" merely connotes a different variety of *quid pro quo* bribery than the term "influence." *Id.*

In adopting this construction of § 666, we eliminate any possibility that the statute can sustain a gratuity theory of criminal liability; "reward" must be construed to criminalize bribery alone. And, given our finding that § 666 is based directly on the preexisting § 201(b) statute, Congress clearly intended that any bribery conviction under § 666 meet the same standards as a § 201(b) conviction. Because § 201(b) mandates that the prosecution prove the existence of a *quid pro quo*, § 666 must contain the same requirement.

E.

Despite respondent's vigorous objections, we are confident this narrowing of § 666's scope will not unduly hamper federal prosecution of state officials. Our reasoning is twofold.

First, § 666 is only one strand in a larger network of state and federal anti-corruption laws that protect the integrity of local governments. Consider the case of Horan himself; even if acquitted of the § 666 violation on remand, his conviction for the § 1346 violation will stand. In 1980, one future federal judge wrote that the mail fraud statute is the federal prosecutor's "Stradivarius, our Colt .45, our Louisville Slugger." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 Duq. L.Rev. 771, 771 (1980). Forty-odd years later, this adage is truer than ever, as the federal mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1343) provide easy means for prosecutors to combat corruption in an increasingly digital world. Some corrupt local officials

may adapt their criminal behavior after today's decision to escape federal prosecution under § 666. But even if they do, it will be difficult for them to consistently engage in corruption without ever using the mails or the wires – and once they do, prosecutors will quickly be able to turn to their proverbial "Louisville Slugger."

Second, our decision only imposes some *quid pro quo* requirement on § 666; we do not decide whether that *quid pro quo* need be explicitly discussed by criminals before liability attaches, or merely implied by their words and conduct. In fact, our past decisions hint that (outside of the campaign finance context), implied *quid pro* is an acceptable basis for bribery convictions. *See Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). In the instant case, for example, a reasonable jury might not need to see an explicit email discussion between Horan and Simonton before finding a *quid pro quo* existed. Instead, the jury might deduce such an agreement from the fact that Horan did very little catering business with any party besides Simonton, or that Simonton repeatedly and substantially overpaid for various items.

In any case, because we were not briefed on this issue, we leave it for another day. In the interim, we remark only that following this decision, prosecutors still may not need to show a "smoking gun" conversation between briber and bribee to convict under § 666; a theory of implied *quid pro quo* alone may suffice.

III.

18 U.S.C. § 666 requires a *quid pro quo*. The district court allowed a jury to convict petitioner without this requirement. For that reason, we VACATE the judgment of the Court of Appeals for the Sixth Circuit and REMAND for proceedings consistent with this opinion.

Applicant Details

First Name	**Joshua**
Middle Initial	**E**
Last Name	**Zakharov**
Citizenship Status	**U. S. Citizen**
Email Address	**jez8239@nyu.edu**
Address	**Address** Street **2621 Palisade Ave, Apt. 9J** City **Bronx** State/Territory **New York** Zip **10463** Country **United States**
Contact Phone Number	**7186441721**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2020**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Murphy, Liam
liam.murphy@nyu.edu
212-998-6160

Alvarez, Jose
jose.alvarez@nyu.edu
(212) 992-8835

Issacharoff, Samuel
samuel.issacharoff@nyu.edu
212.998.6580

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am writing to express my interest in clerking in your chambers during the 2025-26 term. I am a rising 3L at New York University School of Law, where I serve as Articles Editor on the *N.Y.U. Law Review* and was designated one of the top ten students in the class by GPA after 1L and 2L. I currently work at Covington & Burling in Washington, D.C. as a summer associate. After graduating, I will clerk for Judge Anthony J. Scirica on the United States Court of Appeals for the Third Circuit.

Letters of recommendation and contact information will follow from NYU for Professor Samuel Issacharoff, Professor Liam Murphy, and Professor Jose Alvarez. I was a research assistant for Professor Issacharoff and took his Procedure course in 1L and Complex Litigation course in 2L. I was a teaching assistant for Professor Murphy in 2L and took his Contracts course in 1L. I was also a teaching assistant for Professor Alvarez in 2L and took his International Law course in 1L.

The following are also willing to speak as references. I am currently a research assistant for Professor Samuel Rascoff and took his Intelligence course in 2L. Camilla Macpherson is Head of Secretariat of P.R.I.M.E. Finance, the international arbitration organization in The Hague where I interned during the summer after 1L. Nicholaus Mills is a law clerk to Judge Rachel P. Kovner, to whom I reported when I was an extern in Judge Kovner's chambers in the autumn of 2L. Their contact information is as follows:

Samuel Rascoff: samuel.rascoff@nyu.edu; (917) 861-3019
Camilla Macpherson: c.macpherson@primefinancedisputes.org; +44 7442 594 495 (United Kingdom)
Nicholaus Mills: ncm56@cornell.edu; (704) 359-7216

My resume, transcript, and writing sample are attached. Thank you very much for your consideration and I look forward to hearing back. If any further information is needed concerning my application, please let me know.

Respectfully,
/s/ Joshua Zakharov

JOSHUA E. ZAKHAROV
2621 Palisade Ave, Apt. 9J, Bronx, NY 10463
(718) 644-1721
zakharov@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.963
Honors: Pomeroy Scholar (one of ten students with the top cumulative grades after 1L)
Butler Scholar (one of ten students with the top cumulative grades after 2L)
New York University Law Review, Articles Editor
Institute for International Law and Justice Joyce Lowinson Scholar (merit scholarship)
Activities: Research Asst., Prof. Issacharoff (Summer '22); Center for Civil Justice (Spring '23)
Teaching Asst., Prof. Murphy, Contracts (Fall '22); Prof. Alvarez, Int'l Law (Spring '23)
NYU Trial Advocacy Society (mock trial competition team), External Partnerships Chair

UNIVERSITY OF CHICAGO, Chicago, IL
B.A. Public Policy Studies, B.A. Political Science, *magna cum laude*, June 2020
Senior Thesis: *The Scandinavian Exception to the Law and Finance School*
Honors: Departmental Honors in Public Policy and Political Science
Activities: Vice President, Chicago Debate Society
Research Assistant to Prof. Robert Pape, Chicago Project on Security and Threats

EXPERIENCE

THE HON. ANTHONY J. SCIRICA, U.S. COURT OF APPEALS, THIRD CIRCUIT, Philadelphia, PA
Judicial Law Clerk, August 2024 – August 2025 (expected)

COVINGTON & BURLING LLP, Washington, DC
Summer Associate, May 2023 – July 2023 (expected)
Staffed to matters in regulatory enforcement, class actions, white collar and investigations, and CFIUS.

THE HON. RACHEL P. KOVNER, U.S. DISTRICT COURT, E.D.N.Y., New York, NY
Judicial Extern, August 2022 – December 2022
Drafted memoranda, oral rulings, and opinions. Provided research and review for clerks' drafts. Worked on matters including bankruptcy and SSA appeals, immigration, habeas, and FCA.

KALIKOVA & ASSOCIATES, Bishkek, Kyrgyzstan
Summer Associate, July 2022 – August 2022
Wrote guide for IFIs and foreign investors. Drafted memos on mens rea and jurisdiction for international dispute.

PANEL OF RECOGNIZED INTERNATIONAL MARKET EXPERTS IN FINANCE, The Hague, Netherlands
Summer Legal Intern, May 2022 – July 2022
Contributed to World Bank project on derivatives market development, edited commentary on P.R.I.M.E. Arbitration Rules, proposed changes to P.R.I.M.E. Mediation Rules. Represented P.R.I.M.E. at UNCITRAL meeting at the UN.

U.S. DEPARTMENT OF STATE, Tashkent, Uzbekistan
Fulbright Award, January 2021 – July 2021
Placed at Academy of the General Prosecutor's Office of Uzbekistan and Uzbekistan State World Languages Univ. as English Teaching Assistant. Organized legal English seminars for staff, students at Prosecutor's Academy; assisted comparative law research and translation. Led debate, reading, speaking clubs, taught first-year English at UzSWLU.

DELOITTE, New York, NY
Consultant, Global Trade Advisory, August 2020 – January 2021
Advised clients on business implications of trade policy. Researched bills of lading for forced labor investigations. Briefed CBP administrative rulings to advise clients on import matters. Supported A&D clients on export licensing.

ADDITIONAL INFORMATION

Conversational in Russian and French. Hobbies include speed chess, guitar, table tennis, and coaching debate.

Name: **Joshua E Zakharov**
Print Date: **06/07/2023**
Student ID: **N15764509**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	A-
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	A+
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: James F Gilligan, David A J Richards, Maegan F Ciolino			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Emma M Kaufman			
International Law	LAW-LW 11577	4.0	A+
Instructor: Jose E Alvarez			
Contracts	LAW-LW 11672	4.0	A
Instructor: Liam B Murphy			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Pomeroy Scholar-Top Ten Students in the first year class

Fall 2022

School of Law
Juris Doctor
Major: Law

Comp Constitutional Law	LAW-LW 10221	2.0	A
Instructor: Tarunabh Khaitan			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Liam B Murphy			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Kenji Yoshino			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande, Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande, Alison J Nathan			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2022 Research Assistant			
Instructor: Samuel Issacharoff			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	46.0	46.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff, Arthur R Miller			
Intelligence: Law, Strategy, Ethics Seminar	LAW-LW 10439	2.0	A
Instructor: Samuel J Rascoff			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Strategic Human Rights Litigation Seminar	LAW-LW 12531	2.0	A
Instructor: Philip G Alston, James Andrew Goldston			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	58.0	58.0

Butler Scholar - Top Ten Students in the Class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law

40 Washington Square South
New York, New York 10012-1099
Telephone: (212) 998-6160
Facsimile: (212) 995-4894
Email: liam.murphy@nyu.edu

Liam Murphy
Herbert Peterfreund Professor of Law
& Professor of Philosophy

June 5, 2023

Dear Judge

It is a pleasure to write in support of JOSHUA ZAKHAROV's application for a clerkship in your chambers. Josh was a stand-out student in my contracts class last year. On the basis of his classroom performance and his excellent exam, I asked him to be one of my TAs this past fall. I know him very well.

Josh is already a very impressive young lawyer. His performance in law school puts him at the very top of his class. He is a Pomeroy Scholar—one of the ten best performing students in the first year—and his second-year performance maintained that level of all-around excellence. In my contracts class, he was a frequent and cheerful volunteer, one of the students I could count on to end a moment of silence. His choice of courses—from a judicial externship in the E.D.N.Y. to a seminar in comparative constitutional law, from complex litigation to a seminar on strategic human rights litigation—show a remarkable breadth and depth of interest. That he excels in all these domains, from the most theoretical to the most legal-practical, augers well, I believe, for his value as a clerk.

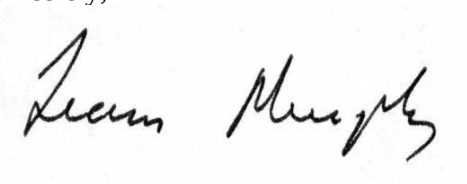
But it is perhaps the Josh I know from working with him as a TA that is most relevant to his special qualifications for a clerkship. My practice is to ask my TAs to discuss sample problems with a section of the contracts class. Every other week, I meet with the TAs as a group to discuss the sample problems—which they take turns drafting. These sessions, where the TAs essentially workshop each other's problems are very enjoyable for me as a teacher as I get to observe a group of very talented students engage collaboratively with one another. I have always thought that students who perform exceptionally well in this context are excellent candidates for clerkships—Josh is such a case. Not only did Josh come with excellent drafts of his own, but he was also incredibly quick at picking up on worries that others had, nailing down the worry, and fixing the problem with dispatch. So he clearly can take constructive critical feedback very well.

Perhaps even more valuable, since his own drafts rarely needed much improvement, was his ability to suggest improvements to others' work. Josh exudes kindness and helpfulness, so much so that what is, in fact, the identification of a serious problem might be received as a kind of encouraging compliment with a suggestion about how to make things even better. It was quite wonderful to see this combination of kindness and brilliance at work in a collaborative context.

Josh has a great future ahead of him, one that will much benefit his country. I have mentioned the breadth of Josh's interests. But this is not dilettantism on his part. Rather, he aims for a career that can combine his core interests in international, private, and comparative law. He has already identified relevant programs in different departments of the Federal Government that allow for his. I have not the slightest doubt that important and original legal work will be done by Josh in the future.

Josh is very intelligent, very hard-working, an excellent writer, and an excellent lawyer with an already impressively diverse range of expertise. He is also, as I have emphasized, an extremely effective collaborator and a kind, lovely person. I recommend him very warmly and in the highest terms. Please do feel free to contact me if I may be of any further assistance.

Sincerely,



June 13, 2023

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

Joshua Zakharov, a candidate for the JD in the class of 2024, has asked me to write on his behalf in connection with his applications for judicial clerkship. I am delighted to have this opportunity to write on his behalf as Mr. Zakharov, the son of Soviet emigres, is truly one of the most gifted students that I have had an opportunity to teach in my dozen years at New York University's School of Law. He has my highest recommendation.

It is rare for me to award students with an A+ in any of my classes as this is a grade that professors are not required to give under NYU's strict first year grading curve. Like many of my colleagues on the faculty, I reserve that grade to students whose exam preference is at least ten points above the next best student received. It has been some years since I last awarded that grade in my first year international law course (one of eight electives offered to our one-Ls). Mr. Zakharov exceeded my internal standards and was far and away the best exam in that course – and among the best that I have ever seen in teaching that course for nearly 30 years. (I also note that he was one of the few students that I have seen to have secured the same A+ grade twice in his first year.) International law – which is actually more of a curriculum than a single course insofar as its subject matter essentially addresses all first year subjects (from contracts to civil procedure) whenever these topics involve the crossing of an international border – is probably the most difficult of our first year elective courses. Mr. Zakharov – an active participant from the first day of the course – wrote an astonishingly comprehensive and well- written response to an exam that required the ability to answer detailed factual hypotheticals, jurisprudential inquiries, and mastery over black-letter doctrine.

As is evident from his transcript, Mr. Zakharov's performance in my class was replicated throughout his first year at the law school. Mr. Zakharov's transition from magna cum laude graduate of the University of Chicago to NYU law school has been seamless. As is clear from his achieving Pomeroy Scholar status, Mr. Zakharov is at the top of his class, with all of his first year grades in the A range. Clearly our admissions office was not wrong to attract him from rival law schools with a merit-based scholarship. He is one of the few students that I have encountered that I can truly say was born to be a lawyer – and not only because he clearly has thrived on the Law Review as he did in competitive debate prior to applying to law school. His talents have been evident among all of us teaching first year students. It appears that many of us competed to have him serve as a teaching assistant (TA) in our first year courses as he entered his second law school year. Indeed, I was too late in that competition as my colleague, Prof. Murphy managed to entice him to serve as her TA in first year contracts (while another colleague, Sam Issacharoff managed to snatch him as a research assistant). Mr. Zakharov served as my TA in the international law first year elective purely on his own time. Astonishingly, he volunteered to do this without receiving the usual TA academic credit and on top of a full load of courses, considerable responsibilities as a TA for another course, and deep commitments for the law review. He did an exceptional job as my TA. Over the past 13 weeks he became a highly trustworthy assistant who has earned praise from the many first year students who regularly came to his weekly office hours and those who participated in seven 'optional' working sessions that he has helped to organize and teach. Mr. Zakharov is obviously adept at not only absorbing new knowledge quickly but also in conveying that knowledge to others. Assuming he succeeds in his applications for a judicial clerkship, I would expect him to be part of a collegial team capable of imparting lessons learned within the group.

Despite his limited time in law school, Mr. Zakharov has had an unusually diverse set of experiences in the law. Very second year law students have, as he has, worked in the chambers of a US district judge, been exposed to international financial disputes and arbitration, deployed quantitative skills to address trade policy, or used foreign language skills to advance the goals of the U.S. State Department in Uzbekistan. Given his diverse talents and interests in the law, I am not surprised that he is considering both trial and appellate clerkships as well as other public interest and private law firms in the immediate short term. He would excel in any of these capacities – and indeed would make a terrific academic should he decide to go in that direction. (He is under consideration to become a Furman fellow here – an honor we reserve to those whom the faculty identifies as having the talent and aptitude to become law professors.)

It is also important to point out that Mr. Zakharov is more than his sterling GPA suggests. Mr. Zakharov is engaging, has a sense of humor, works well with others, and, despite his accomplishments, is unassuming and a pleasure to work with. He has managed to educate me about what it means to genuinely listen and care for others.

There is no question in my mind that he would be an asset to any chambers lucky enough to have him.

Sincerely yours,
José E. Alvarez
Herbert and Rose Rubin Professor of International Law

Jose Alvarez - jose.alvarez@nyu.edu - (212) 992-8835

New York University
A private university in the public service

School of Law
Faculty of Law

40 Washington Square South
New York, NY 10012-1099
Telephone: (212) 998-6580
Facsimile: (212) 995-4590
E-mail: samuel.issacharoff@nyu.edu

Samuel Issacharoff
Reiss Professor of Constitutional Law

Dear Judge:

I have been teaching for over 30 years and have taught thousands of students and worked closely with hundreds as teaching or research assistants, or in supervision of independent research. To recommend Josh Zakharov for a clerkship, I have to reach back to the comparisons with the handful that stand out as truly superlative. He is a dazzling intellect, so full of vibrancy and inquiry, so eager to learn and engage ideas, so thoughtful. He is a star by any measure.

The easy part of the recommendation is the formal credentials. He is one of the top ten students in the class. He is on law review. He has all A-level grades – indeed he would have a 4.0 GPA had he not ended up one point short of the A/A- divide in my complex litigation class. He has a wonderful undergraduate education from the University of Chicago, the school that year in, year out provides many of my best students. Something in the air in Hyde Park seems to prompt great critical inquiry and a joy in learning, and Josh is certainly an exemplar of both.

Josh was a student of mine his first semester of law school. He immediately impressed me with the precision of his comments and questions. He was not overly assertive initially, but I took note that every time he spoke the discussion advanced substantially. I also took note of his writing. In first semester civil procedure, I give three graded writing assignments, and Josh was clearly a gifted writer, evident in even the short essays. He then ended up with the highest grade in my class.

I hired Josh to work for me as an RA over his first summer, on an overload basis. He was working in the Hague and then in Kyrgyzstan, and used his extra time to produce extraordinary work as I was finishing my book on Democracy Unmoored. Even here, Josh was much more engaging than simply great research work. He is a truly fascinating person with far-ranging interests. He came to law school with interests in international affairs, national security, and Central Asia. He scoured databases on foreign law firms that would hire an American intern, and ended up spending 6 weeks in Bishkek, the capital of Kyrgyzstan, at a commercial firm that needed help on some international arbitration matters. He is headed neither to practice in Central Asia nor most likely to commercial arbitration. But he wanted to encounter what the legal world looked like in a legally-unsettled former Soviet Republic. I recall having zoom sessions with him from this home in Bishkek, certainly one of the more unusual research meetings I have had.

Josh continued to work for me as a research assistant in his second year, until law review and other tasks started to consume his time. I also had regular dealings with him in my Complex Litigation course, where he engaged the materials at a level that just stood out. But for one silly mistake on the exam, he would have easily had an A, perhaps an A+. He is just stellar at everything he touches, and he is also a delightful person to work with. His interests now gravitate toward national security and comparative constitutional law and complex litigation. While life will force him to sort that out, these areas dovetail with

critical interests of mine, allowing for a great deal of fruitful exchange, even beyond the work requirements of class or being a research assistant. In fact, I value not only his smarts but his judgment, and look forward to my exchanges with him as I would with a junior colleague.

After taking Complex Litigation, Josh decided to write his student note on one of the more difficult problems in aggregate litigation today: the extent of closure that can be realized through different joinder mechanisms. Specifically, he is looking at two recent decisions from the Third and Seventh Circuit on efforts to use issue preclusion through pretrial orders in MDLs and at a very recent Tenth Circuit decision on the expanded use of issue classes. I am supervising his Note and have seen the initial drafts dealing with *Home Depot* and *Looper*, the two issue preclusion cases. It is thoughtful, engaging, and well-crafted, just as I would have expected.

Josh has already accepted a clerkship with Judge Anthony Scirica beginning when he graduates in 2024. I have over the years recommended a number of my star students to Judge Scirica, and had no hesitation in recommending Josh to him. Josh is now looking for a district court clerkship after he finishes with Judge Scirica. As should be evident, I think Josh is a genuine star and will make a great law clerk. I have only the best things to say about him.

Please feel free to call if there is any further information I can provide.

Sincerely,

Samuel Issacharoff

Writing Sample

This writing sample is a draft order on a motion to dismiss a False Claims Act complaint, which I wrote as an extern to Judge Kovner in the fall semester of 2022. It was released to me from chambers and approved with redactions of party names, the caption and case number, and other identifying information. I am the sole author with the exception of the paragraph stating the standard of review for 12(b)(6) motions, which is common across drafts in chambers. I have also edited it for length.

In 2015, plaintiff [redacted] brought this *qui tam* action against defendants [redacted] and [redacted], alleging fraud and retaliation in violation of 31 U.S.C. §§ 3729(a)(1)(A-B), 3729(a)(2), and 3730(h) ("FCA") and N.Y. State Fin. Law §§ 189(1)(a-b) and 191 ("NYFCA"). Defendants moved to dismiss the complaint for failure to state a claim. For the reasons discussed below, plaintiff's FCA and NYFCA fraud claims are dismissed, but his retaliation claims may proceed.

BACKGROUND

The following is a summary of the allegations contained in plaintiff's complaint. From 2007 to 2014 plaintiff was employed by [redacted] ("[redacted]"), a New York provider of medical transportation and ambulance services led by Chief Executive Officer [redacted]. Compl. ¶ 16 (Dkt. #22). Plaintiff worked first as a [redacted], then as [redacted] and [redacted], and then again as a [redacted] after a demotion. *Id.* ¶ 12. [redacted] terminated plaintiff's employment in July 2014. *Id.* ¶ 87. [redacted] receives "millions of dollars a year" in reimbursements from Medicare and New York Medicaid for providing services to patients covered by those programs. *Id.* ¶ 19.

Plaintiff alleges that during his tenure, [redacted] engaged in a two-part fraudulent scheme to make false claims for reimbursement from government programs. First, [redacted] impermissibly provided ambulance and medical transportation services outside of its "primary territory" in violation of New York Medicaid and Medicare coverage rules. *Id.* ¶¶ 104, 31. Plaintiff references several hospitals outside of [redacted]'s primary territory to which [redacted] provided services, a subcontract with another EMS service whose patients [redacted] would serve outside of [redacted]'s primary territory, and dates on which the services were provided. *Id.* ¶ 42. To avoid detection, [redacted] would then knowingly falsify Prehospital

Care Reports ("PCRs"), inserting inaccurate location codes to make it appear as though services [redacted] provided outside its primary territory were provided within it. *Id.* ¶¶ 48, 52.

Second, [redacted] provided ambulance services that were "not medically necessary . . . regardless of whether the patients' medical conditions require[d] ambulance transport, or, alternatively, would have permitted the patient to use a . . . less expensive form of transport," including transport for patients who were "ambulating normally" and "feeling fine." *Id.* ¶ 54. Then, on [redacted]'s instruction, [redacted] would "include false information about patients' conditions on the PCRs" to mask this scheme as well. *Id.* ¶¶ 61–62. Based on these false PCRs, [redacted] would then submit false claims to Medicare using the CMS-1500 form, and to New York Medicaid using the New York State eMedNY-000201 claim form. *Id.* ¶¶ 67, 73.

Plaintiff further alleges that after raising concerns about these fraudulent practices to [redacted] and other agents of [redacted], [redacted] retaliated against him with verbal harassment, *id*. ¶ 80, demotion, *id*. ¶ 85, and eventually termination, *id*. ¶ 87. For example, in May 2012, after plaintiff received an assignment that he believed would violate the primary territory rules, he notified his dispatcher. *Id.* ¶ 80. The dispatcher responded by instructing him to "do the . . . call," and another [redacted] agent contacted plaintiff the following day and told him to "keep quiet and mind [his] business." *Ibid.* That same year, plaintiff approached [redacted] "with his concern that the company was breaking the rules" as to primary territory operations, *id.* ¶ 79, to which [redacted] responded by telling plaintiff not to pursue those concerns further. *Ibid.* Two years later, after plaintiff told [redacted] that "he would not go along with breaking the law" by "changing codes" on PCRs, [redacted] demoted plaintiff from his operations position to "the lowest level [redacted]," stopped automatic deductions from plaintiff's paycheck for child support, "ultimately laid

[plaintiff] off," distributed memoranda around [redacted] disparaging plaintiff, and sued plaintiff. *Id.* ¶¶ 85-89.

Plaintiff filed this action in 2015 asserting four *qui tam* claims, two under the False Claims Act (FCA) and two under the New York False Claims Act (NYFCA), and two whistleblower retaliation claims, one under the FCA and one under the NYFCA.

New York State declined to intervene on November 12, 2021, and the federal government declined to intervene on November 17, 2021. The State of New York's Notice of Election to Decline Intervention (Dkt. #16); The Government's Notice of Election to Decline Intervention (Dkt. #17). Following the government's declinations to intervene, plaintiff's counsel moved to withdraw as counsel on February 1, 2021, which the Court granted but stayed the withdrawal until March 2, 2022 so that plaintiff had time to find new representation. Order dated February 16, 2022. Instead, plaintiff opted to proceed *pro se* and refiled his complaint shortly thereafter. Notice of Req. to Continue Pro Se (Dkt. #21); Notice of False Claims Act Compl. (Dkt. #22).

Defendants moved to dismiss, and plaintiff did not reply by the original, first-extended, or second-extended deadline, Order dated June 23, 2022, and the Court "consider[s] defendants' motion fully briefed." Order dated August 25, 2022; *Kinnion v. Comm'r of Soc. Sec.*, No. 17-CV-06455 (AMD), 2019 WL 982508, at *1 (E.D.N.Y. Feb. 27, 2019).

STANDARD OF REVIEW

To survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint fails

to plausibly state a claim and is properly dismissed when "the allegations in a complaint, however true, could not raise a claim of entitlement to relief" as a matter of law, *Twombly*, 550 U.S. at 558, or when "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct" as matter of law, *Iqbal*, 556 U.S. at 679.

DISCUSSION

Pro se plaintiff's *qui tam* FCA and NYFCA fraud claims are dismissed because neither can be brought by a *pro se* litigant, and plaintiff is not represented by counsel. But he sufficiently alleges his FCA and NYFCA retaliation claims and they may proceed.

I. Plaintiff's *qui tam* FCA and NYFCA fraud claims are dismissed.

Plaintiff attempts to proceed *pro se* in a *qui tam* capacity on his federal and state FCA claims. Compl. ¶ 1 (Dkt. #22). "The FCA permits private persons to bring suit where there has been fraud on the federal government. The *qui tam* provisions of the FCA allow a private plaintiff to sue persons who knowingly defraud the federal government." *Kelly v. New York*, No. 19-CV-2063 (JMA) (ARL), 2020 WL 7042764, at *11 (E.D.N.Y. Nov. 30, 2020) (quoting *United States ex rel. Honda v. Passos*, No. 20-CV-3977, 2020 WL 3268350, at *2 (S.D.N.Y. June 15, 2020)). "However, *pro se* litigants lack standing to bring *qui tam* claims under the FCA." *Kelly*, 2020 WL 7042764, at *11 (citing *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008)).

Pro se litigants lack standing to bring *qui tam* claims because when a party files a *qui tam* claim under the False Claims Act or a state equivalent, they are "not litigating his or her own interest, but rather, the interest of the government." *Bowens v. Corr. Ass'n of New York*, No. 19-CV-1523 (PKC) (CLP), 2019 WL 1586857, at *5 (E.D.N.Y. Apr. 12, 2019) (quoting *United States ex rel. Mergent Servs.*, 540 F.3d at 93). Another's interest cannot be litigated *pro se*, since "only

one licensed to practice law may conduct proceedings in court for anyone other than himself." *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951). Because plaintiff is alleging fraud claims against not him but the United States and New York State, he is therefore "not litigating his . . . own interest" and cannot effectively represent the United States—the nature of a *qui tam* suit—*pro se*. *Bowens*, 2019 WL 1586857, at *5. Thus, those claims must be dismissed. In *Kelly*, for example, the court dismissed plaintiff's FCA claims "[b]ecause Plaintiff, a non-lawyer *pro se* litigant, lack[ed] standing," so "his FCA claims [were] not plausible." *Kelly*, 2020 WL 7042764, at *11; *see also United States ex rel. Mergent Servs.*, 540 F.3d at 93 (noting that because relators "lack a personal interest" in *qui tam* actions, they are not the real party in interest and "the right to bring the claim belongs to the United States," not to relators to assert *pro se*); *Palmer v. Fannie Mae*, 14-CV-4083 (JFB)(AYS), 2016 WL 5338542, at *4 (E.D.N.Y. Sept. 23, 2016) ("The law in this Circuit is clear that *pro se* litigants may not pursue *qui tam* actions under the False Claims Act."). This case is no different.

The same is true of claims brought under the New York False Claims Act. Federal law informs the interpretation of the NYFCA in general as "New York courts look toward federal law when interpreting the New York [False Claims] [A]ct," so it is instructive that federal law does not allow *qui tam* suits to proceed *pro se*. *State ex rel. Seiden v. Utica First Ins.*, 943 N.Y.S. 2d 6, 39 (App. Div. 2012). Furthermore, New York State regulations pertinent to the New York False Claims Act reflect federal law's rejection of *pro se* FCA *qui tam* suits by non-attorneys. N.Y. Proc. Regs. of False Claims Act § 400.4(d) ("If the state or a local government decides not to intervene or supersede in a qui tam action, the *qui tam* plaintiff may not pursue the *qui tam* action on a *pro se* basis unless the *qui tam* plaintiff is an attorney."); *see State ex rel. Banerjee v. Moody's Corp.*,

42 N.Y.S. 627, 629 (N.Y. Sup. Ct. 2016) (describing § 400.4 as "applicable law[]" in a New York False Claims Act case).

Plaintiff's FCA and NYFCA *qui tam* claims therefore must be dismissed because they may not be brought *pro se*.

II. Plaintiff's FCA and NYFCA retaliation claims may proceed.

Because plaintiff sufficiently alleges that he was harassed, demoted, and terminated because of his attempt to remedy his employer's alleged FCA and NYFCA violations, his retaliation claims may proceed. Compl. ¶¶ 109-112 (Dkt. #22).

While a plaintiff may not proceed *pro se* on fraud claims under the False Claims Act, a plaintiff *may* proceed *pro se* on retaliation claims under the False Claims Act. Courts in this Circuit have regularly allowed FCA retaliation claims to proceed *pro se* because the real party in interest in retaliation claims, unlike in *qui tam* claims, is the *pro se* plaintiff. *See Hayes v. Dept. Of Educ. of City of New York*, 20 F. Supp. 3d 438, 443 (S.D.N.Y. 2014) (collecting cases); *Weslowski v. Zugibe*, 14 F. Supp. 3d 295, 309-10 (S.D.N.Y. 2014) (explaining that a *pro se* "FCA retaliation claim is materially different . . . from a relator-initiated FCA claim . . . whereas a relator-initiated FCA claim is a claim brought on behalf of the United States, an FCA retaliation claim is a personal or private cause of action brought on behalf of the individual"). Furthermore, the dismissal of plaintiff's fraud claims does not necessarily imperil his FCA and NYFCA retaliation claims. *See United States v. N. Adult Daily Health Care Ctr.*, 205 F. Supp. 3d 276, 298 (E.D.N.Y. 2016) ("[A] plaintiff need not prevail on his underlying FCA claims" to state a claim of retaliation, "but he must demonstrate that he had been investigating matters that were calculated, or reasonably could have [led], to a viable FCA claim.") (internal quotations omitted).

To state a claim of retaliation under the FCA, plaintiff must allege "(1) that he engaged in activity protected under the statute; (2) that the employer was aware of such activity; and (3) that the employer took adverse action against him because he engaged in the protected activity." *Dhaliwal v. Salix Pharm., Ltd.*, 752 F. App'x 99, 100 (2d. Cir. 2019) (quoting *United States ex rel. Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 95 (2d Cir. 2017)). Activity protected under the FCA refers to "lawful acts done by the employee . . . in furtherance of an [FCA] action . . . or other efforts to stop 1 or more [FCA] violations." 31 U.S.C.A. § 3730(h)(1). This includes "refusal to engage in a fraudulent scheme, which under the facts as pled was intended and reasonably could be expected to prevent the submission of a false claim to the government." *United States ex rel. Chorches*, 865 F.3d at 96. An adverse action under the FCA includes termination or loss of employment, *id.* at 93, demotion, *Garcia v. Aspira of New York, Inc.*, No. 07 Civ. 5600(PKC), 2011 WL 1458155, at *3 (S.D.N.Y. Apr. 13, 2011), harassment, and "any other form of retaliation," *Faldetta v. Lockheed Martin Corp.*, No. 98 Civ. 2614(RCC), 2000 WL 1682759, at *11 (S.D.N.Y. Nov. 9, 2000). *See* 31 U.S.C.A. § 3730(h). Although it does apply to fraud claims under the FCA, "Rule 9(b)'s heightened pleading standard does not apply to . . . FCA retaliation claim[s] since no showing of fraud is required," so plaintiff's claims of retaliation need only be plausible to proceed. *United States ex rel. Mooney v. Americare, Inc.*, No. 06–CV–1806 (FB)(VVP), 2013 WL 1346022, at *8 (E.D.N.Y. Apr. 3, 2013); *see Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

Plaintiff's complaint plausibly alleges all three elements. First, plaintiff claims he engaged in protected activity under the FCA and NYFCA. Once "he learned about the primary territory restrictions and realized that [redacted] was operating in violation of them," he "approached [redacted] with his concern that [[redacted]] was breaking the rules" and refused to

"go along with breaking the law." Compl. ¶¶ 79, 85 (Dkt. #22). Both declining to perform services that plaintiff reasonably believed violated the FCA and approaching [redacted] with concerns about those services constitute protected activity under the FCA. *United States ex rel. Chorches*, 865 F.3d at 96 (holding that refusal to falsify a PCR, exactly the report plaintiff alleges [redacted] was falsifying, is protected activity under the FCA); *Dhaliwal*, 752 F. App'x at 101 (finding that "raising a concern that [plaintiff's employer] was potentially committing 1 or more violations of the FCA" is protected activity) (internal quotations omitted).

Second, plaintiff alleges his employer's awareness of his protected activity. Plaintiff alleges not only that [redacted] and [redacted] were aware of his refusal to go along with the scheme, but also that they urged plaintiff not to pursue his concerns with the scheme any further. Compl. ¶¶ 79-80 (Dkt. #22); *id.* ¶ 85. For example, when plaintiff informed [redacted] circa May 2012 of his suspicion that [redacted] was submitting false claims, a [redacted] agent told plaintiff to "keep quiet" and to "mind [his] business." *Ibid.* Plaintiff continued conveying his concerns and refusal to participate in PCR falsification to [redacted] agents and [redacted] regularly from May 2012 through April 2014. *Id.* ¶¶ 79-84.

Finally, plaintiff alleges that his employer took adverse action against him because of that protected activity. Defendants "demoted [plaintiff]" from his [redacted] position to a low-level [redacted] "in response to [plaintiff's] raising concerns about out-of-territory ambulance services" and stopped automatic child support deductions from his pay without his consent, causing default. *Id.* ¶¶ 84-86. Plaintiff also alleges that the retaliation continued beyond his departure from [redacted], including with a retaliatory lawsuit and the distribution of a "memo" at [redacted] stating that "[a]nyone that can catch [plaintiff] working . . . with [other ambulance services] . . . will receive a finder's fee." *Id.* ¶ 88. These allegations, asserting that

plaintiff was harassed, demoted, and eventually terminated as a result of his complaints of fraud to [redacted], are thus sufficient to state a claim for retaliation. *See N. Adult Daily Health Care Ctr.*, 205 F. Supp. 3d at 300 (E.D.N.Y. 2016) (finding allegations of demotion and termination because of protected conduct to be sufficient to state a claim under the FCA and NYFCA).

Plaintiff also alleges violations of § 191 of the NYFCA for the same conduct. Finding a violation of the federal False Claims Act's provisions against retaliation would entail finding a violation of the analogous state provisions. When a plaintiff sufficiently states an FCA retaliation claim, they also sufficiently state an NYFCA retaliation claim. *Krause v. Eihab Human Servs.*, No. 10 CV 898 (RJD) (SMG), 2015 WL 4645210, at *4 (E.D.N.Y. Aug. 4, 2015) ("The whistleblower provision of the New York FCA [§ 191] is essentially identical in language and substance to its federal counterpart." (quoting *Forkell v. Lott Assisted Living Corp.*, No. 10–CV–5765 (NRB), 2012 WL 1901199, at *13 (S.D.N.Y. May 21, 2012))); *id.* at *6 (applying the same analysis to find both FCA and NYFCA retaliation claims). The foregoing thus applies with equal force to plaintiff's state law retaliation claims.

Thus, by alleging that he engaged in a protected activity of which his employer was aware and on the basis of which his employer took an adverse action against him, plaintiff sufficiently states his FCA and NYFCA retaliation claims. Those claims may proceed notwithstanding the failure of plaintiff's fraud claims.

CONCLUSION

Defendants' motion to dismiss is granted as to plaintiff's FCA and NYFCA fraud claims. Defendants' motion to dismiss is denied as to plaintiff's FCA and NYFCA retaliation claims.